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## Convergence and Divergence Between International Investments Law and Human Rights Law, in the Context of the Greek Sovereign Debt Restructuring

Venetia Argyropoulou

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# CONVERGENCE AND DIVERGENCE BETWEEN INTERNATIONAL INVESTMENTS LAW AND HUMAN RIGHTS LAW, IN THE CONTEXT OF THE GREEK SOVEREIGN DEBT RESTRUCTURING

VENETIA ARGYROPOULOU

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#### ABSTRACT

*International investment law developed separately from and was, for a long period, perceived as incompatible with human rights law.<sup>1</sup> Despite the tendency to distinguish the evolution of these two fields of international law, however, they are not completely dissimilar.<sup>2</sup> Inter alia, they both aim to safeguard investors' rights to property, to promote respect for due process,<sup>3</sup> and to address the undisputed position of power of the state against the individual.<sup>4</sup> In situations of sovereign default, the asymmetry between the powers of the state and the rights of investors is even more clearly demonstrated, even within the European Union.<sup>5</sup> Indeed, although the European Union Primary Law provides several safeguards to avoid sovereign default,<sup>6</sup> it does not regulate the implications if such a default occurs, leaving investors confronted with a regulatory vacuum subject to states' willingness for "collaboration."<sup>7</sup> Protection awarded by Investment Treaties is not always sufficient. There is considerable variation in the terms of the various Bilateral Investment Treaties (BITs) negotiated by different countries, where investors are often not covered by the applicable investment treaty.<sup>8</sup>*

*This paper explores the developments brought about by the Financial Crisis of 2007, the actions taken by Greece affecting foreign investors, and the study of human rights implications of such actions as examined in cases of debt structuring, both in human rights venues as well as in international investment tribunals.<sup>9</sup> This paper additionally explores how such developments can arise through the interpretation of human rights treaties, such as the European Court*

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<sup>1</sup> Shannon Lindsey Blanton & Robert G. Blanton, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, 69 THE J. OF POL. 143, 143–55 (2007).

<sup>2</sup> *Id.* at 148.

<sup>3</sup> Ursula Kriebaum, *Foreign Investments & Human Rights - The Actors and Their Different Roles*, TDM 1 TRANSNAT'L DISP. MGMT (2013).

<sup>4</sup> Moshe Hirsch, *Investment Tribunals and Human Rights: Divergent Paths*, HUM. RTS. IN INT'L INV. L. AND ARB. 98, 114 (Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann eds., Oxford U. Press 2009).

<sup>5</sup> *Id.*

<sup>6</sup> See HELMUT SIEKMANN, *LIFE IN THE EUROZONE WITH OR WITHOUT SOVEREIGN DEFAULT?* 13, 18–23 (Franklin Allen, Elena Carletti, & Giancarlo Corsetti eds., FIC Press 2011).

<sup>7</sup> *Id.* at 23.

<sup>8</sup> *Id.*

<sup>9</sup> See *infra* Parts II–VIII.

of Human Rights (ECtHR), in the context of investment law.<sup>10</sup> This article demonstrates the need for human rights law to complement investment treaties and to effectively safeguard investors' rights.<sup>11</sup>

#### I. SOVEREIGN DEBT DEFAULT AND INTERNATIONAL INVESTMENT TREATIES

Sovereign default, i.e., the situation where a sovereign state can no longer satisfy its financial obligations, may lead to situations where investors' rights are violated with very little or no effective remedies.<sup>12</sup> This has been the case for centuries, and despite several legal developments, the position of investors remains troublesome.<sup>13</sup>

Initially, defaulting states addressed sovereign defaults in a minimal or negligible manner, with creditors having few, if any, options for negotiations.<sup>14</sup> It was not long ago that states dealt with sovereign defaults as a game of "*bras de fer*,"<sup>15</sup> where states avoided paying their debts by resorting to opportunistic defaults.<sup>16</sup> Meanwhile, more powerful states occasionally resorted to exercising severe political pressure, even using force, to protect their citizens' interests jeopardized by the default.<sup>17</sup> Such was the case in *Venezuelan Preferential Treatment of Claims of Blockading Powers* where, following several failed attempts to settle the dispute by diplomatic negotiations, the British, German, and Italian governments declared a blockade of Venezuelan ports.<sup>18</sup> Similarly, in 1902, the Argentine Minister of Foreign Affairs, Luis María Drago, in a diplomatic note to the United States, argued that the public debt of Latin American states should not give rise to a right of armed intervention.<sup>19</sup>

The lack of adjudication, exercise of political influence, and broad immunities, both from adjudication and from enforcement enjoyed by state actors in sovereign default scenarios, act as deterrents to investment in foreign countries.<sup>20</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See Siekmann, *supra* note 6, at 14–15.

<sup>13</sup> See *id.* at 26.

<sup>14</sup> See *id.* 14.

<sup>15</sup> Michael Waibel, *Sovereign Defaults Before International Courts and Tribunals*, CAMBRIDGE STUD. IN INT'L AND COMP. L. 22 (Cambridge U. Press 2011).

<sup>16</sup> See Siekmann, *supra* note 6, at 16.

<sup>17</sup> See *id.*

<sup>18</sup> Germany et al. v. Venezuela (Preferential Claims Case), Tribunal of the Permanent Court of Arbitration (1904).

<sup>19</sup> Luis M. Drago, *State Loans in Their Relation to International Policy*, 1 AM. J. INT'L L. 692 (1907); see also Waibel, *supra* note 15.

<sup>20</sup> See Siekmann, *supra* note 6, at 23.

Indeed, customary investment law appeared insufficient to protect and therefore attract foreign investors.<sup>21</sup> Thus, many states, recognizing that foreign investment could assist their economic development and growth, began adopting investment treaties to provide additional protection.<sup>22</sup> This led international investment law to develop into treaty law.<sup>23</sup> As referenced below in discussions of particular BIT provisions, the treaties in some respects appear to codify public international law.<sup>24</sup> One view, however, holds that there are so many BITs precisely because they derogate from otherwise prevailing standards of customary international law.<sup>25</sup> Ultimately, there is room for debate on the issue of whether BIT provisions strengthen customary law standards or merely codify them.<sup>26</sup> What is abundantly clear is that, even those BIT provisions that facially reiterate customary international law have a greater impact on state capacity to enforce human rights, in practice, than customary law doctrines.<sup>27</sup>

## II. SOVEREIGN DEBT DEFAULT AND HUMAN RIGHTS

Around the same time as the rapid development of BITs, international human rights law began to grow significantly and obtained international recognition. This significant metamorphosis primarily manifested itself in the recognition of negative rights that awarded protection against abuses of state power impacting individual and group rights. The development of negative rights can be viewed as analogous to the way investment treaties set certain substantial and procedural guarantees limiting state interference with investment.<sup>28</sup> Of course,

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<sup>21</sup> Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity Of Bilateral Investment Treaties* 38 VA. J. INT'L L. 639, 660 (1998).

<sup>22</sup> *Id.* at 639–88 (discussing reasons why especially developing States began adopting BITs).

<sup>23</sup> *Id.* at 652.

<sup>24</sup> Patrick Dumberry, *Are BITs Representing The 'New' Customary International Law In International Investment Law?* 28 PA. ST. INT'L L. REV. 675, 675–701 (2010).

<sup>25</sup> Paul Peters, *Investment Risk and Trust: The Role Of International Law*, INT'L L. & DEV., 131, 153 (1988).

<sup>26</sup> Andrew T. Guzman, *Saving Customary International Law* 161–63 (UC Berkeley Public Law Research Paper 2005); see also Bernard Kishoiyian, *Utility of Bilateral Investment Treaties In The Formulation Of Customary International Law*, 14 NY J. INT'L L. & BUS. 327 (1993).

<sup>27</sup> See generally Stephen M. Schwebel, *Investor-State Disputes and the Development of International Law: the Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. PROC. 27 (2004); Steffen Hindelang, *Bilateral Investment Treaties, Custom and a Healthy Investment Climate: The Question of Whether BITs Influence Customary International Law Revisited*, 5 J. WORLD INV. & TRADE 789 (2004); Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123 (2003).

<sup>28</sup> Kathryn Gordon, Joachim Pohl & Marie Bouchard, *Investment and Human Rights – Investors Rights and Human Rights – Interactions Under Investment Treaty Law*, LSE HUMAN RIGHTS (Sept. 22, 2014), <http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/investors-rights-and-human-rights-interactions-under-investment-treaty-law-by-kathryn-gordon-joachim-pohl-and-marie-bouchard/>.

the scope of protection of human rights law is much broader than that of investment law; still, however, these fields of law can intertwine.<sup>29</sup>

While the clear majority of International Investment Agreements (IIAs) are silent on the way human rights and investment rights may be functionally intertwined, there are some examples in which human rights issues are raised in investment treaties.<sup>30</sup> In particular, we can broadly divide existing IIAs into two eras: pre-1990 and post-1990.<sup>31</sup> Pre-1990 IIAs, which comprise about one-third of the total IIAs, are solely focused on investor rights, while the majority of the post-1990 IIAs make some reference to human rights.<sup>32</sup> Of course, other multilateral investment treaties, like the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT), make no reference to human rights at all.<sup>33</sup> This raises the question of whether it is possible to regulate, directly or indirectly, the human rights aspects of foreign investors' conduct under human rights treaties.

This article explores the ways in which human rights considerations can be used by, and against, investors within the framework of the Greek Default.<sup>34</sup> This article further demonstrates how, given the lack of binding international rules on debt restructuring and the wide discretion enjoyed by states in this framework, a consistent interpretation of human rights norms may prove to be a sustainable protection tool for private investors in sovereign debt restructuring workouts.<sup>35</sup>

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<sup>29</sup> Marc Jacob, *International Investment Agreements and Human Rights*, INEF Research Paper Series on Human Rights - Corporate Responsibility and Sustainable Development 10 (Mar. 2010) [http://humanrights-business.org/files/international\\_investment\\_agreements\\_and\\_human\\_rights.pdf](http://humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf).

<sup>30</sup> See generally *id.* (Discussing how IIAs can address the issue of human rights in two ways: (1) by providing express provisions outlining the state's duty to protect and promote human rights, which is accomplished through the policy provisions or regulatory and enforcement clauses; or (2) by including specific provisions mandating the observance of human rights standards commonly found in other international human rights instruments).

<sup>31</sup> *Id.*

<sup>32</sup> Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities*, INT'L INST. SUSTAINABLE DEV. 11 (2008).

<sup>33</sup> C. REINER, C. SCHREUER, *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION*, HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 83 (Oxford Publishing 2009).

<sup>34</sup> See *infra* Parts I–III, and *supra* Parts IV–VII.

<sup>35</sup> *Id.*

### III. THE FACTUAL BACKGROUND OF THE GREEK DEFAULT

#### A. *The Greek Financial Crisis*

##### 1. *The Economic Situation in Greece*

The Greek government has a long history of problems with its public debt.<sup>36</sup> However, in 2009, the Greek debt increased by an additional EUR 34 billion, delivering the final blow to the Greek economy.<sup>37</sup> By the end of 2009, the Greek economy faced the second highest deficit in percentage of GDP in the EU with an astonishing -13.6%, just behind Ireland, whose relevant rate was a dismal -14.3%.<sup>38</sup> These existing and rising debt levels led to elevated borrowing costs, resulting in a severe economic crisis.<sup>39</sup> Undoubtedly, the situation was exacerbated by individual institutions and other speculators that profited from the economically turbid climate.<sup>40</sup> The case of the Greek Government Bonds (GGBs) is indicative of this challenging environment. In late 2009, GGBs faced continuous rating downgrades by the three major credit rating agencies, namely Standard and Poor's, Moody's, and Fitch.<sup>41</sup> Greece's rating suffered an unprecedented downgrade to "junk status," the lowest rating possible.<sup>42</sup>

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<sup>36</sup> MATTHEW LYNN, BUST; GREECE, THE EURO AND THE SOVEREIGN DEBT CRISIS (Bloomberg Press 2013).

<sup>37</sup> Nicos Christodoulakis, *Crisis, Threats And Ways Out For The Greek Economy*, 4 CYPRUS ECON. POL'Y REV. 90 (2010).

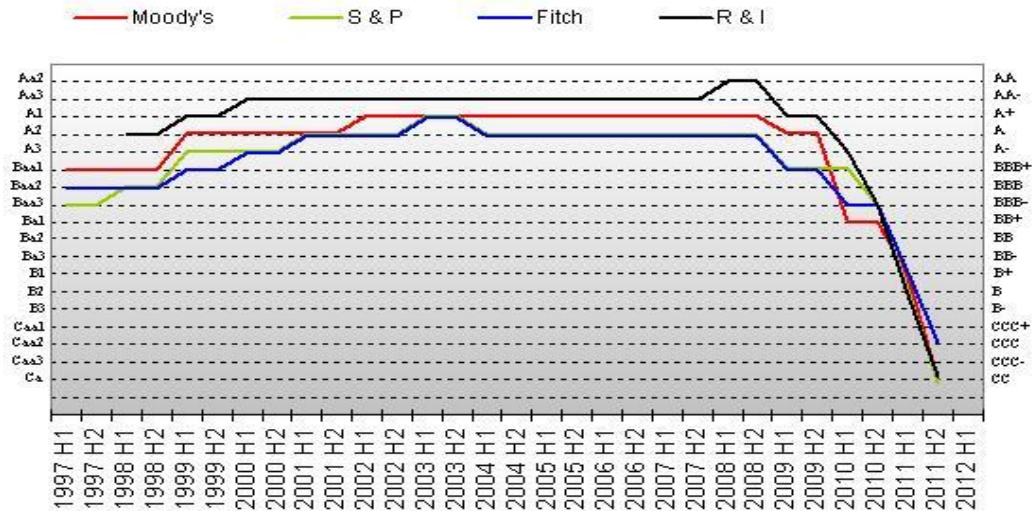
<sup>38</sup> See *Provision of Deficit and Debt Data for 2009 - First Notification*, EUROPEAN COMM'N, <http://ec.europa.eu/eurostat/documents/2995521/5046142/2-22042010-BP-EN.PDF/0ff48307-d545-4fd6-8281-a621cbda385d> (last visited June 28, 2017).

<sup>39</sup> CHRIS O'MALLEY, BONDS WITHOUT BORDERS 223 (John Wiley & Sons 2014).

<sup>40</sup> STATHIS N. KALYVAS, MODERN GREECE 175 (Oxford University Press 2015).

<sup>41</sup> *Id.*

<sup>42</sup> Associated Press, *Greece Debt Downgraded To Junk Status By Moody's*, CBS NEWS (June 14, 2010), <https://www.cbsnews.com/news/greece-debt-downgraded-to-junk-status-by-moodys/>.

Figure 1<sup>43</sup>

It bears mentioning that before the crisis, the ten-year GGB yields were ten to forty basis points above German ten-year bonds; during the crisis, in January 2010, the spread increased to 400 basis points.<sup>44</sup> The graph below further demonstrates the variation of GGB's spreads in relation to the German bond spreads.

#### B. GGB's Spreads, 1993–2011

Spreads on ten-year GGBs relative to ten-year German Bonds (%)

<sup>43</sup> Credit Rating, PUBLIC DEBT MANAGEMENT AGENCY (2018), <http://www.pdma.gr/en/public-debt-strategy/public-debt/credit-rating> (last visited Mar. 2, 2018).

<sup>44</sup> See Ian Chua, *Fiscal Woes To Dog Greek Bonds Even If Aid Offered*, REUTERS, <http://www.reuters.com/article/2010/03/22/us-markets-bonds-peripheral-analysis-idUSTRE62L3XB20100322> (last visited June 28, 2017).



Figure 2<sup>45</sup>

Greece's total debt as of the end of April 2010 was approximately EUR 319 billion.<sup>46</sup> During that same year, Greece consequently turned to both the EU and the International Monetary Fund (IMF) for financial assistance.<sup>47</sup> The EU delayed making any commitment because there was an unwillingness by individual member states to support such an extraordinary undertaking.<sup>48</sup> Also, at the time, the Maastricht Treaty did not provide for any crisis management mechanism, and thereafter, it did not predict the possibility of bailing out a member state that was saddled with high external debt.<sup>49</sup>

Finally, the EU and IMF constructed a bailout package, and on May 2, 2010, the Eurogroup agreed to provide Greece with bilateral guarantees pooled by the European Commission totaling EUR 80 billion to be disbursed over the period May 2010 to June 2013.<sup>50</sup> The financial assistance provided by the European Economic and Monetary Union (EMU) member states was part of a joint package, with the IMF financing an additional EUR 30 billion under a standby

<sup>45</sup> GLOBAL FINANCIAL DATA, <https://www.globalfinancialdata.com/GFD/Article/government-and-debt-in-gfdatabase> (last visited Mar. 2, 2018).

<sup>46</sup> Lee C. Buchheit and G. Mitu Gulati, *How To Restructure Greek Debt* (Duke Law, Working Paper No. 47, 2010).

<sup>47</sup> *Financial Assistance To Greece*, EUROPEAN COMM'N (2014), [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece\\_en](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece_en) (last accessed Dec. 2, 2017).

<sup>48</sup> MICHELLE CINI AND NIEVES PÉREZ-SOLÓRZANO BORRAGÁN, *EUROPEAN UNION POLITICS* 371 (Oxford University Press 2016).

<sup>49</sup> THIESS BUETTNER AND WOLFGANG OCHEL, *THE CONTINUING EVOLUTION OF EUROPE 2* (The MIT Press 2012).

<sup>50</sup> *Financial Assistance to Greece*, *supra* note 47.

arrangement.<sup>51</sup> Furthermore, in an attempt to prevent the spread of the financial crisis to other member states, in June 2010, EU leaders created a new European mechanism and fund, the European Financial Stability Facility (EFSF), to provide financial assistance for EMU member states with severe financial problems.<sup>52</sup> The EFSF consisted of two temporary, three-year lending facilities capable of loaning a total of EUR 500 billion.<sup>53</sup> EU leaders also suggested that the IMF could provide additional support.<sup>54</sup>

The Greek economy has since been almost exclusively supported by the bailout mechanism; primarily on account of the fear that a possible Greek default could contaminate the banking and financial system of other EU member states.<sup>55</sup> As time has passed, however, the situation in Greece has remained largely unaltered, despite the measures taken by the Greek government, and the Greek deficit has remained perilously high.<sup>56</sup> This ongoing problem precipitated decisions in relation to the haircut of the Greek debt.<sup>57</sup>

### 1. *The Way to the Haircuts*

In mid-2011, Greek debt reached approximately 150% of its GDP, an unsustainable figure.<sup>58</sup> At this debt level, even if Greece succeeded in fully cutting its public sector deficit resulting in public sector surpluses, its then current debt level could not be wholly financed from the surplus, even at a relatively low interest rate of 5%.<sup>59</sup> This implied that the yearly interest could not be fully paid from the surplus and would result in increases of the accumulated debt.<sup>60</sup> As such, it was necessary for Greece to continue with severe measures in considera-

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<sup>51</sup> *The Economic Adjustment Programme for Greece: Third Review - Winter 2011*, EUROPEAN COMM'N (2011), [http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2011/pdf/ocp77\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp77_en.pdf) (last accessed Dec. 2, 2017).

<sup>52</sup> Rodrigo Olivares-Caminal, *The EU Architecture To Avert A Sovereign Debt Crisis*, OECD J.: FIN. MKT. TRENDS (2011).

<sup>53</sup> REBECCA M. NELSON, PAUL BELKIN, & DEREK E. MIX, CONG. RES. SERV., GREECE'S DEBT CRISIS: OVERVIEW, POLICY RESPONSES, AND IMPLICATIONS 11 (2010).

<sup>54</sup> *Financial Assistance to Greece*, *supra* note 47.

<sup>55</sup> Vítor Constâncio, *Contagion And The European Debt Crisis*, EUROPEAN CENT. BANK (2011) <https://www.ecb.europa.eu/press/key/date/2011/html/sp111010.en.html>.

<sup>56</sup> *Financial Assistance to Greece*, *supra* note 47.

<sup>57</sup> *Financial Assistance to Greece*, *supra* note 47.

<sup>58</sup> *Preliminary Debt Sustainability Analysis – Updated Estimates and Further Considerations*, INT'L MONETARY FUND, Country Report No. 16/130 (May 2016), <https://www.imf.org/external/pubs/ft/scr/2016/cr16130.pdf>.

<sup>59</sup> Nicholas Economides, *The Greek Crisis, Why Bankruptcy Is A Bad Option, And Why Leaving The Euro Is The Worst Option*, STERN SCH. OF BUS., N.Y.U. (Feb. 12, 2012), [http://www.stern.nyu.edu/networks/Economides\\_Greek\\_Debt\\_Crisis\\_02122012.pdf](http://www.stern.nyu.edu/networks/Economides_Greek_Debt_Crisis_02122012.pdf).

<sup>60</sup> *Id.*

tion of being granted loans to satisfy its current needs and pay off its debts.<sup>61</sup> Therefore, Greece could no longer remain at its fiscal status quo.

It became increasingly apparent that the solution for Greece was to restructure its debt; preferably through a voluntary exchange of old debt with new debt—otherwise known as a “haircut.”<sup>62</sup> Previously considered to be a taboo, echoes of the word “haircut” began to be heard more loudly in connection with Greek debt.<sup>63</sup> A haircut, i.e. a debt restructuring, is a renegotiation between a state and its creditors whereby the creditors agree to accept less than what they would be entitled on the fear of default.<sup>64</sup> A haircut may often involve a reduction of interest rates and/or principal and the extension of a repayment period.<sup>65</sup> In relation to the reduction of principal and interest rates, a review of recent haircuts revealed on balance a post-default recovery rate of between 50% and 70%.<sup>66</sup> Greece was no exception to the rule. Indeed, although it was initially announced that there would be a 21% haircut, an additional 50% haircut followed soon thereafter.<sup>67</sup>

#### i. The First Haircut

Despite the initial bailout package and the many revenue-raising measures adopted in Greece, the Greek debt was simply too sizeable to be satisfied.<sup>68</sup> By the end of June 2011, Greece’s total debt was approximately EUR 353,693 billion out of which approximately EUR 283,000 billion was in the form of bonds while the remaining EUR 70,693 billion corresponded to debt on account of loans.<sup>69</sup> It is important to note that up to Greece’s entrance in the bailout mechanism, the largest share of Greek public debt (about 75% of the total stock) had

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<sup>61</sup> *Id.*

<sup>62</sup> Kevin Gallagher, *Restructuring Greece's debt crisis*, THE GUARDIAN (Jul. 11, 2011), <https://www.theguardian.com/commentisfree/cifamerica/2011/jul/05/greece-debt-crisis-default>.

<sup>63</sup> Associated Press, *Greek debt restructuring no longer taboo*, FIN24 (May 22, 2011) <https://www.fin24.com/Economy/Greek-debt-restructuring-no-longer-taboo-20110522>.

<sup>64</sup> SUE WRIGHT, THE HANDBOOK OF INTERNATIONAL LOAN DOCUMENTATION (Palgrave Macmillan 2014).

<sup>65</sup> *Id.*

<sup>66</sup> Russian restructuring haircuts were in the range of 45%–63%; Ukraine non-resident 30%–56%; Pakistan 31%; Ecuador 27%; Argentina 42%–73%; Uruguay external debt 13% and domestic 23%, see Adrian Blundell-Wignall and Patrick Slovik, *A Market Perspective On The European Sovereign Debt And Banking Crisis*, 1 OECD J.: FIN. MKT TRENDS 13 (2011).

<sup>67</sup> GEORGIOS KARYOTIS AND ROMAN GERODIMOS, THE POLITICS OF EXTREME AUSTERITY 21 (Springer 2015).

<sup>68</sup> See *infra* Appendix No. 1.

<sup>69</sup> See Greek Ministry of Finance, *June 2011 Debt Report*, EUROPEAN COMM’N, [http://ec.europa.eu/economy\\_finance/sgp/deficit/countries/greece\\_en.htm](http://ec.europa.eu/economy_finance/sgp/deficit/countries/greece_en.htm) (last visited Sept. 10, 2017).

been held by foreign banks.<sup>70</sup> These banks were mostly German and French and were combined with mutual funds, pension funds, hedge funds, and other categories of investors who also owned GGBs.<sup>71</sup> However, thereafter the allocation of Greek debt changed significantly.<sup>72</sup> The EU, IMF, and the European Central Bank (ECB) currently hold a significant proportion of Greek Government bonds, but European banks continue to be major holders of non-Greek bonds while a few GGBs have fallen into the hands of individual, non-institutional, investors; though this number is relatively small.<sup>73</sup> The largest holders of GGBs up to December 2011 are presented in Appendix 2.<sup>74</sup>

Given the conditions above, the risk of financial contagion to other EU countries and the implications of a possible unregulated Greek insolvency led to the Agreement of July 2011 (the Agreement), when the second Greek bailout package of up to 109 billion was concluded between the heads of state or governments of the Eurozone and the EU institutions.<sup>75</sup> The Agreement was presented as the final solution to the Greek financial crisis and consequently Europe's financial crisis.<sup>76</sup> It provided for the lengthening of the maturity of future European Financial Stability Facility's (EFSF) loans to Greece to the maximum extent possible—from the current 7.5 years to a minimum of fifteen years and up to thirty years with a grace period of ten years—and at the same time for the substantial extension of the maturities of the existing Greek facility.<sup>77</sup>

In addition, GGB bondholders were also called upon to accept partial repayment of their owed sums and to calculate a 21% Net Present Value (NPV) loss for all products based on an assumed discount rate of 9%.<sup>78</sup> The net contri-

<sup>70</sup> C. Lapavitsas, et al., *The Eurozone Between Austerity and Default*, RES. ON MONEY AND FIN. (Sept. 2010), <http://syllogika.pbworks.com/w/file/fetch/45360374/RMF-Eurozone-Austerity-and-Default.pdf>.

<sup>71</sup> *Id.*

<sup>72</sup> Josephine Vanden Broucke and Ralf Drachenberg, *Extraordinary European Council Meeting On Greece, 12 July 2015*, EUROPEAN PARLIAMENTARY RES. SERV. BLOG (July 11, 2015), <https://epthinktank.eu/2015/07/11/12-july-extraordinary-european-council-meeting-on-greece/>.

<sup>73</sup> See *infra* Appendix No. 2.

<sup>74</sup> *Id.*

<sup>75</sup> See *Statement by the Heads of State or Gov't Of The Euro Area and EU Institutions*, COUNCIL OF THE EUROPEAN UNION (July 21, 2011), [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/123978.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/123978.pdf).

<sup>76</sup> *Id.* at 6.

<sup>77</sup> See *The European Council in 2011*, EUROPEAN COUNCIL (Jan. 2012), [http://www.consilium.europa.eu/uedocs/cms\\_data/librairie/PDF/QCAO11001ENC.pdf](http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/QCAO11001ENC.pdf).

<sup>78</sup> See Press Release, Institute of International Finance, Press Release of the IIF Board of Directors (July 21, 2011), [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5343&context=faculty\\_scholarship](http://webcache.googleusercontent.com/search?q=cache:Q12Sor3NZUgJ:www.dbresearch.com/PROD/DBR_INTERNET_DE-PROD/PROD000000000276168/IIF_Financing_Of_fer_for_Greece.pdf+&cd=1&hl=en&ct=clnk&gl=us; see also Jeromin Zettelmeyer, Christoph Trebesch & Mitu Gulati, <i>The Greek Debt Restructuring: An Autopsy</i>, DUKE U. L. SCH. 1, 6–7 (July 2013), <a href=).

bution of the private sector was estimated at EUR 37 billion.<sup>79</sup> Although the banks ultimately agreed to the haircut voluntarily, they stated that they would not be willing to accept a further reduction.<sup>80</sup> However, this haircut was too small to effectively assist in accommodating Greece's debt and/or solving Greece's credit problems.<sup>81</sup> As such, little time passed before the Agreement was questioned and subsequently revised.<sup>82</sup>

## ii. The Second Haircut

Because all previous measures had essentially failed, Eurozone leaders finally agreed on a structured Greek default wherein bonds would lose 50% of their value and short and medium-term debt would be converted into a long-term debt obligation.<sup>83</sup> The decision was adopted on October 27, 2011, and it contained specific provisions.<sup>84</sup>

The Agreement called for wider Private Sector Involvement (PSI) and participation in establishing the sustainability of the Greek debt.<sup>85</sup> In this regard, it invited Greece, private investors, and all other parties concerned to develop a voluntary bond exchange with a minimum discount of 50% (plus 29% to the already agreed 21% haircut) on national Greek debt held by private investors.<sup>86</sup> As an incentive to attract private investors and especially banks, Eurozone Member States would contribute to PSI a package of up to EUR 30 billion, while the public sector would grant an additional EUR 100 billion until 2014 for bank recapitalization.<sup>87</sup>

The exchange required a wide PSI of approximately 85%-90% or a write-off in the order of EUR 100 billion.<sup>88</sup> This PSI, together with an ambitious reform program, was expected to assist Greece in reaching a debt level of 120% by 2020.<sup>89</sup> The Greek coalition government finally released its official proposal

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<sup>79</sup> *OECD Economic Surveys - Greece*, OECD 23 (Aug. 2, 2011), [http://www.oecd-ilibrary.org/economics/oecd-economic-surveys-greece-2011\\_eco\\_surveys-grc-2011-en](http://www.oecd-ilibrary.org/economics/oecd-economic-surveys-greece-2011_eco_surveys-grc-2011-en).

<sup>80</sup> John Peet and Anton La Guardia, *Unhappy Union*, THE ECONOMIST 37, (Profile Books 2014).

<sup>81</sup> *Id.* at 39.

<sup>82</sup> See Associated Press, *IMF Seeks Radical Changes to EU Debt Strategy*, CBS NEWS (Oct. 5, 2011 10:58 AM), <https://www.cbsnews.com/news/imf-seeks-radical-changes-to-eu-debt-strategy/>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See *Euro Summit Statement of Ministers*, COUNCIL OF THE EUROPEAN UNION (Oct. 26, 2011), [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/125644.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125644.pdf).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

on February 25, 2012, asking investors to accept a haircut of approximately 53.5%.<sup>90</sup>

To achieve this goal, the Greek government passed the Bondholders' Law 4050/2012 (Bondholders' Law) that introduced collective action clauses (CACs), which allowed the restructuring of the GGBs with the consent of a qualified majority of bondholders.<sup>91</sup> This was based on a quorum of votes representing at least 50% of bond's face value and a consent threshold of two-thirds of the face-value holders taking part in the vote,<sup>92</sup> i.e. a majority of more than 66.7% of the bondholders. In particular, in March 2012, the participation of bondholders in the bond exchange reached 152 billion worth of Greek law governed GGBs out of the approximately 177 billion,<sup>93</sup> approximately 85.9%. It allowed Greece to trigger the collective action clauses—which required a two-thirds majority of bondholders—and to compel all Greek law GGB holders to consent to the terms of the bond exchange. In addition, foreign law governed GGB holders also participated in the bond exchange in a percentage of 69%.<sup>94</sup> As such, more than 95% of the issued GGBs participated in the bond exchange; EUR 196.7 billion worth of GGBs out of EUR 205.5 billion GGBs.<sup>95</sup> The remaining GGBs bondholders, approximately EUR 6.4 billion, were given until April 2012 to accept the Greek government's offer to exchange their GGBs.<sup>96</sup> Finally, another EUR 2.4 billion worth of GGBs were exchanged manifesting a participation percentage rate of 96.9%.<sup>97</sup>

Out of the total EUR 205.5 billion in eligible paper, holders of EUR 199 billion worth of bonds participated in the PSI and exchanged for:

- (i) New bonds issued by the Hellenic Republic with an aggregate face value of EUR 62.4 billion—31.5% of the principal amount of the Bonds tendered for exchange;
- (ii) PSI Payment Notes issued by the EFSF in two series maturing on March 12, 2013 and March 12, 2014, respectively, with an aggregate face amount of EUR 29.7 billion—15% of the principal amount of the bonds exchanged; and
- (iii) Detachable GDP-linked securities of the Hellenic Republic with an amount equal to the principal amount of the new

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<sup>90</sup> Press Release, General Ct. of the EU, Press Release No. 119/15 (Oct. 7, 2015), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150119en.pdf>.

<sup>91</sup> *Id.*

<sup>92</sup> See Zettelmeyer, *supra* note 78, at 11.

<sup>93</sup> Press Release, Hellenic Republic Ministry of Finance (Mar. 9, 2012), <http://www.pdma.gr/attachments/article/78/9%20MARCH%202012.pdf>.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> GREECE COUNTRY STUDY GUIDE: STRATEGIC INFORMATION AND DEVELOPMENTS 175 (International Business Publications, USA 2012).

Bonds issued.<sup>98</sup> Following the PSI, Greece's sovereign debt was reduced by approximately EUR 107 billion or 52% of the eligible debt.<sup>99</sup> However, holders of EUR 6.4 billion in face value debt held out and are now being repaid in full to reduce the chances of litigation.<sup>100</sup>

#### IV. HUMAN RIGHTS CONSIDERATIONS IN THE CASE OF SOVEREIGN DEFAULTS

##### *A. Expropriation and its Impact on Foreign Investors*

The act of expropriation—where a government takes a privately-owned property for public benefit—is inherently tied to property rights and is regulated both under Investment Treaties as well as Human Rights Law.<sup>101</sup>

Investment tribunals, when exploring the concept of expropriation, have followed a broad approach to cover interference with various economic rights.<sup>102</sup> Indicatively, the partial award of *Amoco International Finance v. Iran* stated, “[e]xpropriation, which can be defined as a compulsory transfer of property rights, may extend to any rights which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value.”<sup>103</sup> The same approach was adopted in the Iran–U.S. Court Tribunal in the interlocutory award of *Starrett Housing*, where it was declared that “[i]t is a well-settled rule of customary international law that a taking of one property right may also involve a taking of a closely connected ancillary right.”<sup>104</sup> However, IIAs do not offer absolute protection against expropriation, but they allow states to interfere with foreign investors’ property rights provided that certain conditions are met.<sup>105</sup> Namely, the expropriation must be for a public purpose, it should be according to domestic law, and it cannot be discriminatory.<sup>106</sup> Additionally, prompt and adequate compensation should be paid to the investor in exchange for the interference with the rights.<sup>107</sup>

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<sup>98</sup> *Report on the Recapitalisation and Restructuring of the Greek Banking Sector*, BANK OF GREECE (Dec. 2012), [http://www.bankofgreece.gr/BogEkdoseis/Report\\_on\\_the\\_recapitalisation\\_and\\_restructuring.pdf](http://www.bankofgreece.gr/BogEkdoseis/Report_on_the_recapitalisation_and_restructuring.pdf).

<sup>99</sup> Zettelmeyer, *supra* note 78, at 13.

<sup>100</sup> *See id.*

<sup>101</sup> *See generally* *Amoco Int’l Fin. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 220 (1987).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Starrett Hous. Corp. v. Iran*, 16 Iran-US Cl. Trib. 112, 230 (1987).

<sup>105</sup> Rudolf Dolzer & Margrete Stevens, *BILATERAL INVESTMENT TREATIES* 114–15 (1995).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 97.

The same principle is reiterated in human rights' conventions both at the international level as well as the EU level.<sup>108</sup> However, unlike BITs that usually award protection only against expropriation, EU Law provides wider protection against any type of interference with investments.<sup>109</sup> Indicatively, Article 1 of Protocol No. 1 of the European Human Rights Convention (ECHR) provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws, as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>110</sup>

This similarity between IIAs and human rights treaties in the field of expropriation is why the decisions of the ECtHR, as well as the decisions of other regional human rights courts, are important and should be considered by investment tribunals in determining the customary international law of expropriation.<sup>111</sup> To this end, examining the right to property in accordance with the ECHR's Article 1 of Protocol Number 1, can assist investors both before Investment Tribunals, but can also award them an additional remedy before human rights courts such as the ECtHR.<sup>112</sup> We shall now turn to examine the application of Article 1 of Protocol Number 1 of the ECHR in the context of sovereign default.<sup>113</sup>

### *B. Expropriation in Human Rights Law*

As analyzed in the second Article, ECHR's Article 1, Protocol Number 1 ("Article 1") is generally interpreted to entail three rules.<sup>114</sup> Primarily, the first sentence of the first paragraph is more general and it provides the right to peaceful enjoyment of one's possessions and free from the state's intervention.<sup>115</sup> In addition, Article 1 has been interpreted to include two more rules, namely the

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<sup>108</sup> See generally European Human Rights Convention protocol 1, art. 1, March 20, 1952, <http://www.refworld.org/docid/3ae6b38317.html> (last visited Sept. 11, 2017).

<sup>109</sup> PIERRE-MARIE DUPUY, FRANCESCO FRACIONI, ERNST-ULRICH PETERSMANN, HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 239 (Oxford University Press 2009).

<sup>110</sup> See European Human Rights Convention protocol 1, art. 1, March 20, 1952, <http://www.refworld.org/docid/3ae6b38317.html> (last visited Sept. 11, 2017).

<sup>111</sup> CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INT'L INV. ARB. 288 (2d ed. 2017).

<sup>112</sup> *Id.*

<sup>113</sup> See *infra* Part V(b).

<sup>114</sup> Eur. Ct. H.R., *Sporrong v. Sweden*, (1982), paras 35, 50

<sup>115</sup> *Id.*



right not to be deprived of one's property—subject to certain conditions set out in the second sentence of the first paragraph—but also the authority of a State to control the use of property in accordance with the general interest.<sup>116</sup> As evident from the latter rule, not every state interference with property rights will constitute an illegal interference of the rights to peaceful enjoyment of possessions; states are free, however, to take administrative measures that may affect such peaceful enjoyment.<sup>117</sup>

To determine if a state measure is an unlawful interference or a lawful regulation of the right to property, the ECtHR's case law has set certain conditions.<sup>118</sup> Such conditions primarily require that the measure is lawful. Indeed, for any state measure interfering with property rights to be justified, the latter must be, primarily, prescribed by internal law, which is "compatible with the rule of law".<sup>119</sup> Although, the said requirement is expressly stated only in the second rule of Article 1 (which mentions "subject to conditions provided for by law"), the requirement is perceived as being applicable on all 3 rules, as it is based on the principle of legal certainty, one of the fundamental principles of a democratic society which is inherent in the entirety of the ECHR.<sup>120</sup> Additionally, for there to be a lawful interference, the measure must also be justified on grounds of "public interest."<sup>121</sup> Indeed, under ECtHR case law, interference is justified if it serves "a legitimate objective in the public or general interest."<sup>122</sup> As to what constitutes "public interest," as indicated in Article 2, states have wide discretion to determine such grounds.<sup>123</sup> Indicatively, in *James v. United Kingdom*, the ECtHR argued that such determination will be challenged only in the case that it is "manifestly without reasonable foundation."<sup>124</sup>

Public or general interest alone, however, will not suffice. The ECtHR has many times reiterated that when a state's administrative powers interfere with the peaceful enjoyment of one's possessions, a fair balance must be struck between the demands of the general interest of the community and the protection of property rights.<sup>125</sup> Indeed, in addition to serving the public or general interest,

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<sup>116</sup> *Id.* at 35.

<sup>117</sup> *Id.*

<sup>118</sup> See generally Eur. Ct. H.R., *James v. U.K.*, (1986), paras 123, 142.

<sup>119</sup> Eur. Ct. H.R., *Malone v. United Kingdom*, (1984), para. 67; see also GERANNE LAUTENBACH, *THE CONCEPT OF THE RULE OF LAW AND THE EUROPEAN COURT OF HUMAN RIGHTS*, 76 (Oxford University Press 2013).

<sup>120</sup> Aida Grigæ, Zvonimir Mataga, Matija Longar and Ana Vilfan, *The right to property under the European Convention on Human Rights* (Human rights handbooks, No. 10), EUROPEAN COUNCIL (2007), <https://rm.coe.int/168007ff55>.

<sup>121</sup> *Id.*

<sup>122</sup> See *James*, 8 Eur. Ct. H.R. at 142.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 123.

<sup>125</sup> *Sporrong*, 5 Eur. Ct. H.R. at 52.

the interference needs to also be proportional in the sense that there needs to be “a reasonable relationship of proportionality between the means employed and the aim sought to be realized.”<sup>126</sup> Hence, the interference will not be proportional when the individual property owner is made to bear “an individual and excessive burden”.<sup>127</sup>

## V. GREEK GOVERNMENT BONDS AS POSSESSIONS

Before examining whether takings of resources and property in times of sovereign default, especially in the Greek Haircut, constitute a violation of Article 1 of Protocol Number 1 ECHR (Article 1), we need first to establish what constitutes possessions under Article 1. The concept of possessions has been broadly interpreted within the ECtHR’s jurisprudence, so as to include not only the right of ownership, but also a whole range of pecuniary rights, including all acquired rights.<sup>128</sup> These include rights arising from shares,<sup>129</sup> patents,<sup>130</sup> arbitration awards, established entitlements to a pension, entitlements to rent, and even rights resulting from running a business,<sup>131</sup> provided the object of possession may be precisely defined. In *Pine Valley Developments Ltd v. Ireland*,<sup>132</sup> the ECtHR held that even a “legitimate expectation” that a certain state of affairs will occur constituted a component of the property and was, therefore, eligible for protection under Article 1. A “legitimate expectation”, however, should be interpreted narrowly, must have a more concrete nature than a mere hope, and must be based on a legal provision or a legal act.<sup>133</sup>

In the recent case of *Mamatas*,<sup>134</sup> the ECtHR examined how the application of Collection Action Clauses (CACs) can interfere with an applicant’s property right by converting bonds into instruments of lesser value without consent. The applicants argued that the Bondholders’ Law unilaterally introduced CACs and that the CACs’ forcible conversion of their bonds to notes of lesser nominal value constituted a violation of Article 1 taken alone or in conjunction with Article 14 of the ECHR.

<sup>126</sup> *James*, 8 Eur. Ct. H.R. at 142.

<sup>127</sup> Grgiæ et al., *supra* note 120.

<sup>128</sup> Dirk Ehlers, EUROPEAN FUNDAMENTAL RIGHTS AND FREEDOMS 132, 132–33 (2007).

<sup>129</sup> *Bramelid v. Sweden*, App. No. 8588/79, 5 Eur. Comm’n H.R. Dec. & Rep. 249 (1982).

<sup>130</sup> *Kline v. Netherlands*, App. No. 12633/87, 66 Eur. Comm’n H.R. Dec. & Rep. 70 (1990).

<sup>131</sup> AIDA GRGIĆET AL., THE RIGHT TO PROPERTY UNDER THE EUROPEAN CONVENTIONS ON HUMAN RIGHTS: A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS PROTOCOLS (June 2007), [http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-10\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-10(2007).pdf).

<sup>132</sup> *Pine Valley Developments Ltd. v. Ireland*, 16 Eur. Ct. H.R. 379 (1992).

<sup>133</sup> *Pressos Compania Naviera S.A. v. Belgium*, 21 Eur. Ct. H.R. 301 (1996).

<sup>134</sup> *Mamatas v. Greece*, App. No. 63066/14, Eur. Ct. H.R. (2016).

To determine the applicability of Article 1 of Protocol 1, the ECtHR first examined whether GGBs constitute “possessions,” although the parties did not dispute this. The legal nature of GGBs is that of contractual loan agreements where investors pay the state the nominal value of a bond in exchange of repayment of that nominal value plus interest at a specified date in the future. Under this construction, bondholders may legitimately expect payment of the bonds on the repayment date, at which time unpaid dates would constitute enforceable debts. In this regard, although many GGBs were not due at the time of the Greek Haircut, GGBs would fall under the concept of “possessions,” as contemplated under Protocol Number 1 of the ECHR, since bondholders had a legitimate expectation to receive payment of the bond value plus interest.<sup>135</sup>

Indeed, in *Mamatras*, the ECtHR noted that bonds “are tradeable in stock markets, they can be transferred from one bearer to the other, [and] their value depends on various factors,” but at the end of the day, “upon maturity, bonds are expected to return their nominal value.”<sup>136</sup> Based on this reasoning, the ECtHR concluded that GGBs are in fact possessions. This view was also upheld in the former ECtHR case of *Fomin and Others v. Russia* in 2013.<sup>137</sup> It should be noted, however, that one could argue that at the time of the Greek Haircut, Greece was already in a default, and as such, investors’ claims against Greece could hardly give rise to legitimate expectations that the debt would be repaid considering insolvency is one of the risks inherent in any investment.”<sup>138</sup> Based on this reasoning, as there were no legitimate expectations to be protected, it could be argued that there were no possessions.

### 1. Greek Haircut Interfering with Possessions?

Having determined that GGBs do constitute “possessions,” we turn to whether the Greek Haircut constitutes arbitrary interference with such possessions. To this end we first examine the ECtHR’s findings in *Mamatras*.

#### i. The Court’s Reasoning in *Mamatras v. Greece*

The applicants in the *Mamatras v. Greece* case claimed that the unilateral amendment of the terms regulating their GGBs via law the Bondholders’ Law 4050/2012, and the subsequent forcible conversion of their bonds based on

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<sup>135</sup> Eur. Ct. H.R., *Stran Greek Refineries v. Greece*, (1994).

<sup>136</sup> Eur. Ct. H.R., *Mamatras v. Greece*, (2016).

<sup>137</sup> Eur. Ct. H.R., *Fomin v. Russia*, (2013); *see also* *Malysh v. Russia* (2010); *Tronin v. Russia*, (2010); *Lobanov v. Russia*, (2010); *Andreyeva v. Russia*, (2012).

<sup>138</sup> Matthias Goldmann, HUMAN RIGHTS AND SOVEREIGN DEBT WORKOUTS (Apr. 9, 2014), <https://ssrn.com/abstract=2330997> or <http://dx.doi.org/10.2139/ssrn.23309977>.

CCAs, was tantamount to expropriation.<sup>139</sup> The ECtHR agreed that the conversion was imposed without their consent, and was, therefore, an interference with their right of peaceful enjoyment of their property.<sup>140</sup> The ECtHR, however, held that this, in and of itself, was not necessarily an illegal interference in breach of Article 1,<sup>141</sup> nor did it automatically amount to expropriation. Indeed, ECtHR rejected the applicants' argument that the conversions were tantamount to expropriation, noting that the unilateral amendment of the GGBs' terms did not constitute a deprivation of bondholders' property, as investments in sovereign bonds are inherently risky investments whose value fluctuates per market's risks.<sup>142</sup>

Thereafter, the ECtHR proceeded to examine whether the above measures were justified on grounds of public interest. In line with the margin of appreciation doctrine, the ECtHR concluded that the PSI aimed to maintain economic stability and restructure Greece's sovereign debt in a time of great economic recession, therefore, acting in the general interests of the public.<sup>143</sup>

Lastly, the ECtHR examined the conversion considering the principle of proportionality and concluded that the "haircut" sustained by the applicants was not large enough to amount to a legislative "termination of or an insignificant return" on their investment.<sup>144</sup> It was noted that the value of the bonds after the conversion should not be compared to their previous nominal value, since it does not represent the bond's real monetary value on the date of the introduction of Law 4050/2012.<sup>145</sup> Instead, the ECtHR ruled that there was no violation of Article 1 because the significantly reduced monetary value of the bonds on such date should be taken into account as means of comparison.<sup>146</sup>

## 2. *Analysis of the Court's Reasoning in Mamatas v. Greece*

Now we examine whether the ECtHR's aforementioned reasoning was well founded.

We shall primarily examine if the ECtHR's finding that there was no expropriation, was in line with ECtHR's previous caselaw. Under Article 1, for an expropriation of property to have occurred, a total deprivation of property is

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<sup>139</sup> See *Mamatas*, App. No. 63066/14, Eur. Ct. H.R.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See Eur. Ct. H.R., *Mamatas v. Greece* (2016).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

needed.<sup>147</sup> In other words, expropriation involves the direct transfer of a property title from the owner to a public body or another private individual.<sup>148</sup> Alternatively, ECtHR has also recognized the possibility of de facto expropriation,<sup>149</sup> that may take place when the owner is not formally expropriated, but his ability to exercise his property rights is limited in such a grave way that he factually does not have ownership anymore.<sup>150</sup> In the case of the Greek Haircut, there wasn't any direct transfer of ownership of GGBs to the State, hence no direct expropriation had occurred. As to whether, the introduction of CACs could be interpreted as indirect expropriation, there should not remain any possible use or economic value to the bondholders of Greek law governed GGBs.<sup>151</sup> In the present case, the GGBs maintained an economic value that still entitled investors to partial repayment of the value of the GGBs at the specified period. Hence, it seems that ECtHR was correct to determine that no expropriation had taken place.

Moving on, we shall examine if the ECtHR was correct to find that there was a justifiable interference with the property rights of bondholders. To this end, we shall examine if the introduction of CACs by the Greek Government to all Greek-law governed GGBs was lawful, in the public interest and whether a fair balance was struck.

In relation to whether the introduction of CACs was lawful, primarily we must examine if the measure was prescribed by internal law. At present, the introduction of CACs was prescribed by the Bondholders' Law, which was adopted by the Parliament and published in the Government's Gazette. However, the existence of an internal law is not sufficient to conclude the measure was lawful, but it must also be examined whether the Bondholders' Law and its provisions were stipulated with sufficient precision to enable the persons concerned to foresee, to a reasonable degree vis a vis the circumstances, the consequences which a given action might entail.<sup>152</sup> In the *Mamatras v. Greece*, ECtHR held that the Bondholders' Act, as well as all other legal texts relating to the debt restructuring, were known to the bondholders prior to the debt restructuring.<sup>153</sup> Addition-

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<sup>147</sup> PIERRE-MARIE DUPUY, FRANCESCO FRANCIONI, ERNST-ULRICH PETERSMANN, *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 238, (Oxford University Press 2009).

<sup>148</sup> Laurent Sermet, *The European Convention on Human Rights and property rights*, Human rights files, No. 11 rev, Council of Europe Publishing (1999).

<sup>149</sup> Eur. Ct. H.R., *Sporrong v. Sweden* (1982).

<sup>150</sup> *Deprivation of Property and Control of Use*, ECHR ONLINE, <http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/control-of-use-and-deprivation-of-property/> (last accessed Feb. 27, 2018).

<sup>151</sup> See Eur. Ct. H.R., *Papamichalopoulos v. Greece* (1993) as well as Eur. Ct. H.R., *Popov v. Moldavia* (2005) and Eur. Ct. H.R., *Karagiannis and others v. Greece* (1993).

<sup>152</sup> Grgiæ et al., *supra* note 120.

<sup>153</sup> *Id.*

ally, ECtHR noted that the consequences of the refusal of the bond exchange were also predictable in advance and to this end ECtHR concluded that introduction of CACs and the subsequent bond exchange was lawful. However, one must note that ECtHR did not examine the fact that the Bondholders' Law was introduced only a few days before the sovereign bond exchange. Additionally, the ECtHR did not refer to the arbitral and unilateral amendment of the bond terms, that, in essence, constitute a contractual instrument, whose amendment was not foreseeable by the investors.

We proceed to explore if the ECtHR was right to find that the introduction of CACs served a legitimate aim in the general (public) interest. As already indicated, this is a field where States enjoy a margin of appreciation, as the definition of general and public interest may vary from country to country over time.<sup>154</sup> This is in line with the ECtHR's previous case law awarding broad discretion to states in determining what constitutes public interest.<sup>155</sup> In a similar case,<sup>156</sup> the ECtHR referred to the difficult financial state of the Russian Federation and noted, "[d]efining budgetary priorities in terms of favoring expenditures on pressing social issues to the detriment of claims with purely pecuniary nature was a legitimate aim in the public interest."<sup>157</sup> This was reiterated also in the case of *Koufaki and Adedy v. Greece*<sup>158</sup> that related to the Greek financial crises and the ECtHR stated that unless the State measure is manifestly devoid of any reasonable foundation, ECtHR will not interfere with the State's determination that it serves the public interest.

Lastly, we shall examine ECtHR's reasoning in relation to whether a "fair balance" was struck, i.e. whether the measure was proportionate. The principle of proportionality requires that there is a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective.<sup>159</sup> As previously stated, the ECHR has many times reiterated the need for a "fair balance" between the demands of the general interest of the community and the protection of individual property rights, when a state's administrative powers interfere with the peaceful enjoyment of property.<sup>160</sup>

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<sup>154</sup> Laurent Sermet, *The European Convention on Human Rights and property rights* (Human rights files, No. 11 rev.), COUNCIL OF EUROPE PUBLISHING 33 (1999).

<sup>155</sup> Indicatively, see *Eur. Ct. H.R. Lithgow and others v. the United Kingdom*, (1986), para. 102 where the Court noted that in light of States' direct knowledge of the society and due to the fact that decisions regarding nationalization legislation usually involved issues where there was a range of opinions within any democratic society, the national authorities were in a better position to establish what was appropriate in the circumstances and had therefore a wide margin of appreciation.

<sup>156</sup> See *Eur. Ct. H.R. Malyshev v. Russia* (2010).

<sup>157</sup> *Id.*

<sup>158</sup> *Eur. Ct. H.R. Koufaki and Adedy* (2013).

<sup>159</sup> RICHARD CLAYTON & HUGH TOMLINSON, *THE LAW OF HUMAN RIGHTS* 278 (2009).

<sup>160</sup> See, e.g., *Eur. Ct. H.R. Sporrong v. Sweden* (1982), para. 35.

Unlike the Court of Justice of the European Union, where the principle of proportionality can be broken down in three rules: i) the principle of suitability, ii) the principle of necessity, and iii) the principle of stricto sensu proportionality<sup>161</sup>, in determining whether a balance has been struck, the ECtHR's case law seems to examine whether a measure is "both appropriate for achieving its aim and not disproportionate thereto".<sup>162</sup> Indeed, the principle of stricto sensu proportionality, is rarely examined by the ECtHR.<sup>163</sup> Instead, ECtHR takes into account several factors, including, inter alia, "the character of the interference, the aim pursued, the nature of property rights interfered with and the behavior of the Applicant and the interfering State authorities".<sup>164</sup> These elements are important in examining whether a fair balance has indeed been reached.<sup>165</sup> Therefore, it is important to examine whether the retroactive introduction of CACs into GGBs via Law 4050/2012 meets the above proportionality test.

Primarily, we must examine if the measure is appropriate for achieving its aim. This principle is satisfied when the measure introduced to the state is causally linked with the legitimate aim pursued by it.<sup>166</sup> Thus, we should examine if the introduction of CACs is relevant to maintaining economic stability, as was found in the *Mamatas* case. As already indicated in the presentation of the factual background of the Greek Default, the introduction of CACs, at the very least, facilitated the achievement of a wide debt restructuring in line with the decision of October 27, 2011.<sup>167</sup> It therefore directly contributed to Greece receiving financial aid and in reducing its debt by about 107 billion euros. In light of the previously indicated factual background of the Greek Default and the pressing financial circumstances, the introduction of CACs and subsequent bond exchange was justifiably found appropriate.

Notably, however, ECtHR did not take into account the availability of alternative solutions, in the sense that there were no alternative, less onerous measures available.<sup>168</sup> Although, this test is not strictly interpreted, as it was in-

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<sup>161</sup> See Olivier Corten, L'UTILISATION DU "RAISONNABLE" PAR LE JUGE INTERNATIONAL - DISCOURS JURIDIQUE, RAISON ET CONTRADICTIONS 571 (1997); Jan H. Jans, *Proportionality Revisited*, 3 LEGAL ISSUES OF ECON. INTEGRATION 239 (2000).

<sup>162</sup> Eur. Ct. H.R., *James v. United Kingdom* (1994).

<sup>163</sup> Sybe A. de Vries, *Balancing Fundamental Rights with Economic Freedoms according to the Court of Justice of the European Union*, 9 UTRECHT L. REV. 1 (2013).

<sup>164</sup> Eur. Ct. H.R., *Forminster Enterprises Limited v. the Czech Republic*, (2009), para. 75.

<sup>165</sup> See Jonas Christoffersen, *Straight Human Rights Talk — Why Proportionality does (not) Matter?*, 55 SCANDINAVIAN STUD. IN L. 17 (2010).

<sup>166</sup> Thomas Kleinlein, *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, 12 GERMAN L.J. 1141, 1149 (2011).

<sup>167</sup> Miranda Xafa, *Lessons from the 2012 Greek debt restructuring*, VOX (June 25, 2014), <http://voxeu.org/article/greek-debt-restructuring-lessons-learned>.

<sup>168</sup> See Kleinlein, *supra* note 166.

dictated in *James v. United Kingdom*,<sup>169</sup> “the availability of alternative solutions . . . constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a ‘fair balance’”.<sup>170</sup> The fact that the ECtHR did not however take this test into account is, however, understandable in this instance, that relates to complex financial measures related to Greece’s economy. After all, to satisfy the above test, the State needs only to demonstrate that there are sufficient relevant reasons to justify the measure as reasonable.<sup>171</sup>

We therefore proceed to examine if the unilateral introduction of CACs and the subsequent bond exchange introduced in order to achieve financial stability stroke a fair balance vis a vis the losses sustained by bondholders. The principle requires courts to “scale” the objective pursued against the interference sustained by the prejudiced investors.<sup>172</sup> Here as well, the States enjoy a margin of appreciation, in light that State authorities are better placed to assess both the existence of the general interest and of the necessity of the restriction of the rights, in light of their direct contact with the social process of their country.<sup>173</sup> Still, however, such margin of appreciation is not unlimited, as this would render the protection awarded under Article 1 of the Protocol 1 illusive.<sup>174</sup> Hence, the essence of the rights should be guaranteed, during the exercise of the State’s margin of appreciation.

It would be interesting to examine how the ECtHR has dealt with large scale interference with property rights in other cases relating to extreme situations and fundamental changes. Indicatively, we may refer to the case of *Broniowski v. Poland*<sup>175</sup> that took place in the aftermath of the re-establishment of local self-government in Poland. The case related to an alleged failure by the Polish authorities to satisfy the applicant’s compensatory claim in relation to property in Lwów (now Lviv, in Ukraine).<sup>176</sup> This property previously belonged to his grandmother, who was the owner at the time the area was still part of Poland, prior to the Second World War. In the aftermath of the Second World War, when Poland’s eastern border had been redrawn, the applicant’s grandmother, along with many other residents of the eastern provinces of Poland, was repatri-

<sup>169</sup> Eur. Ct. H.R., *James v. United Kingdom*, (1994).

<sup>170</sup> *Id.* at para. 15, *see also* Eur. Ct. H.R., *Mellacher and other v. Austria* (1989), Eur. Ct. H.R. *Blecic v. Croatia* (2004).

<sup>171</sup> Eur. Ct. H.R., *Sunday Times v. United Kingdom* (1992).

<sup>172</sup> *Id.*

<sup>173</sup> AIDA GRGJÆ, ET AL., A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS PROTOCOLS 13 (2007).

<sup>174</sup> SEBASTIÁN LÓPEZ ESCARCENA, INDIRECT EXPROPRIATION IN INTERNATIONAL LAW 61 (2014).

<sup>175</sup> Eur. Ct. H.R., *Broniowski v. Poland* (2004).

<sup>176</sup> *Id.*



ated. To this end, already in 1946, Poland enacted a law providing for compensation in kind for those that had been repatriated. However, 44 years later the applicant had not yet received compensation, as due to various transfers of state owned land to local authorities, the State Treasury had insufficient land to offer such compensation.<sup>177</sup> ECtHR accepted that in complex political and economic situations, stringent limitations on compensation may be justified, but noted that the stringer the limitations, the more persuasive the reasons for the imposition of such limitations must be.<sup>178</sup> To this end, ECtHR found that the Polish State had failed to provide satisfactory justifications as to the extensive and continuous failure to implement the compensatory payments to the applicant and other eligible claimants. By the time of the hearing of the case, the applicant had received approximately 2% of the compensation's value. Hence, as the relation between the value of the property taken and the compensation paid was manifestly disproportionate, the Court found a violation of Article 1 of Protocol No. 1.

The same result was also reached in the case of *Maria Atanasiu and Others v. Romania*,<sup>179</sup> that related to the issue of restitution or compensation in respect of properties nationalised or confiscated by the Romanian State following the establishment of the communist regime in Romania in 1947. ECtHR found that the fact that the applicants had obtained no compensation for the nationalization of their property and it was uncertain when they might receive same, placed a disproportionate burden on them, in breach of Article 1 of Protocol No. 1.

Similarly, in the case of *Yuriy Lobanov v. Russia* involving depreciated bond values impairing full bond redemption, ECtHR found that, while the interference was lawful and was conducted pursuant to a legitimate aim, a fair balance was not struck between the interests of the bondholders and those of the state.<sup>180</sup> The claim in question related to the action taken by the government of the Russian Federation to suspend payments under the 1982 state premium bonds.<sup>181</sup> The claim was brought after the federation enacted a series of legislative and regulatory Acts,<sup>182</sup> which provided for the conversion of Soviet securities, including 1982 state premium bonds, into special Russian promissory notes. Despite, however, the enactment of the said legislation already from several years, by the hearing of the case the framework had not still been established to enable the conversion.<sup>183</sup> ECtHR once again found that, although the radical re-

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<sup>177</sup> *Id.*

<sup>178</sup> ELIZABETH WICKS, BERNADETTE RAINEY, CLARE OVEY, JACOBS, WHITE AND OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 567 (2017).

<sup>179</sup> Eur. Ct. H.R., *Maria Atanasiu and Others v. Romania* (2011).

<sup>180</sup> Eur. Ct. H.R., *Yuriy Lobanov v. Russia* (2010), para. 37.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

form of Russia's political and economic system, as well as the state of the trouble Russian economy at the time, may have justified stringent financial limitations on rights of a purely pecuniary nature, nonetheless it found that the Russian Government had failed to adduce satisfactory justifications for non-implementing the conversion and thus not allowing applicants to get compensation.<sup>184</sup> This was also the finding of the ECtHR in *Malysh and Others v. Russia*,<sup>185</sup> that related to the absence of implementing regulations for redemption of a different type of Russian bonds, namely Urozhay-90, as well as in the case of *Tronin v. Russia*<sup>186</sup> and *SPK Dimskiy v. Russia*<sup>187</sup>, that were also founded on the same facts.

As evident from the above cases, although ECtHR acknowledged the radical political and economic situations in the relevant states, nonetheless to examine if a fair balance was struck, the ECtHR considered if the applicants had received compensation and if the latter was satisfactory (although it was recognized that such compensation need not correspond to full market price). If no compensation was paid, the ECtHR examined whether the State had produced justifying grounds for the non-payment of satisfactory compensation. This is an important distinction between human rights law and investment law, as in the latter the measure of compensation is not taken into account to establish if an expropriation has taken place, but, instead once an expropriation has been found, the payment of compensation determines if the expropriation is legal.<sup>188</sup>

In the case of *Mamatras v. Greece* however, ECtHR did not follow those steps. Instead, ECtHR stated that bondholders could not rely on the previous caselaw and claim they received no or only nominal compensation, as one need not take into account the repayment value of the bonds at maturity, but the market value of the bonds at the time of the bond exchange, when already their market value was very low. To support this, ECtHR referred to the inherent risky nature of the bond market, due to the relatively long maturity date that may be affected by unpredictable events that can have a bearing on the State's creditworthiness. In fact, ECtHR referred to the case of the European Court of Justice, *Accorinti v. ECB*,<sup>189</sup> only to denote that bondholders were aware of the increased risks associated with GGBs during the financial crisis.

This is not surprising, if one takes into account ECtHR's caselaw throughout the financial crisis in the EU. As indicated in the second Article, ECtHR had taken an approach similar to that in *Mamatras* case, in the case of *Dennis Grain-*

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<sup>184</sup> *Id.* at para. 52.

<sup>185</sup> Eur. Ct. H.R., *Malysh and Others v. Russia* (2010).

<sup>186</sup> Eur. Ct. H.R., *Tronin v. Russia* (2010).

<sup>187</sup> Eur. Ct. H.R., *SPK Dimskiy v. Russia* (2010).

<sup>188</sup> Hirsch, *supra* note 4.

<sup>189</sup> Case T-79/13, *Alessandro Accorinti and Others v. European Central Bank*, 2015 E.C.R.

*ger and others v. UK*,<sup>190</sup> ECtHR took note that the two largest claimants were hedge funds incorporated in the Cayman Islands, that had bought their shares when the financial difficulties of Northern Rock were widely apparent. In this regard, ECtHR had resolved that the decision taken in the legislation that the former shareholders of Northern Rock should not be entitled to take the value which had been created by the Bank of England's loan was justified as "had the Northern Rock shareholders been permitted to benefit from the value which had been created and maintained only through the provision of State support, this would encourage the managers and shareholders of other banks to seek and rely on similar support, to the detriment of the United Kingdom economy."<sup>191</sup>

However, in the *Mamatras* case ECtHR does not specify why the repayment value of the bonds should not be taken into account, when bondholders' legitimate expectations related to that repayment price upon maturity. Similarly, it is unclear why in the previous case law related to bonds' depreciation, this factor was not taken into account. It is the authors' view that this is a normative determination. To support, such determination, the ECtHR denoted that Greece was in the brick of insolvency, implying the measures were taken due to economic necessity.<sup>192</sup> Thus, unlike previous cases, where the ECtHR did take into account the radical financial conditions, only to grant wide margin of appreciation to the state authorities, noting at the same time that the state authorities must provide solid justifications for any interference with property rights, in the case of *Mamatras v. Greece*, ECtHR viewed the financial crisis as justification.

Of course, one should take in to account, that the aforementioned cases against Russia (Lobanov, Maylysh, Tronin etc), were however characteristically different because the claims in question were brought several years after the events of radical political and economic transform. Clearly, the financial situation of the Russian Federation in 2000 was substantially different than the financial situation of Greece in 2012, when Greece was on the verge of disorderly insolvency and the measure of a bond exchange to reduce Greece's debt at that period of imminent insolvency can be more easily justified. Hence, the ECtHR's judgment in *Mamatras* would probably have been the same if the court had applied the aforementioned test.

Lastly, it is interesting to compare the *Mamatras* judgment with other cases decided by the ECtHR pertaining to the financial crisis. The case of *Koufaki and*

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<sup>190</sup> Eur. Ct. H.R., *Dennis Grainger and others v. UK* (2012).

<sup>191</sup> Eur. Ct. H.R., *Dennis Grainger and others v. UK* (2012). In fact, in the said case, the Eur. Ct. H.R. noted that the 1500 small shareholders of Northern rock were rather misfortunate that their case was consolidated with that of the two hedge funds. See Michael Waibel, *ECHR leaves Northern Rock shareholders out in the cold*, EJIL: TALK! (Aug. 3, 2012), <https://www.ejiltalk.org/echr-leaves-northern-rock-shareholders-out-in-the-cold/>.

<sup>192</sup> *Mamatras* (2016) at para. 118.

*Adedy v. Greece*<sup>193</sup> is indicative in this instance. Although, the facts of that case were different relating to austerity measures adopted by the Greek Government including cuts in pensions and public servants' salaries, what is important is to review ECtHR's stance over the financial crisis in the EU. ECtHR noted that measures taken in this context will commonly involve considerations of political, economic and social issues. Thus, State authorities enjoy a "wide margin of appreciation" in such matters. Invoking the principle of subsidiarity, the ECtHR self-limited its powers stipulating that it is not its role to make economic policy and it will, thus, not interfere with or second-guess the State's decisions, unless these are arbitrary or unreasonable.<sup>194</sup> This decision has been cited several times in other cases relating to austerity measures with the EU,<sup>195</sup> and it is the author's view that it is indicative of the ECtHR's treatment of all cases relating to the financial crisis in the EU. This is rather disappointing, if one takes into account that in times of "exceptional crisis without precedent,"<sup>196</sup> the interferences with property rights are more common and more extreme and wide-scale and it would be in such cases where ECtHR's role would be more integral.

#### VI. NON-DISCRIMINATORY TREATMENT - INVESTMENT LAW

In sovereign debt restructuring, a differentiated treatment of creditors of the same class may be necessary to achieve an optimum result during reorganization. As such, when examining cases involving breach of the treaty standard for non-discriminatory treatment, investment tribunals often find that difference in treatment is not discrimination.<sup>197</sup> This is so only if the discrimination is not justified by a rational policy.<sup>198</sup> *Occidental Exploration and Production Co. v. Ecuador (Occidental)* provides an illustration of the process followed by investment tribunals. There, Ecuador was held by the tribunal to have breached a National Treatment clause because the claimant oil company was denied the refund for value-added tax, which domestic seafood and flower producers were receiving.<sup>199</sup> In reaching its conclusion, the tribunal held that because each company was an exporter, they were comparable.<sup>200</sup> The second step was to deter-

<sup>193</sup> Eur. Ct. H.R., Koufaki and Adedy v. Greece (2013).

<sup>194</sup> Linos-Alexandre Sicilianos, *The European Court of Human Rights at a time of crisis In Europe*, SEDI/ESIL (October 16, 2015) [http://www.esil-sedi.eu/sites/default/files/Sicilianos\\_speech\\_Translation.pdf](http://www.esil-sedi.eu/sites/default/files/Sicilianos_speech_Translation.pdf).

<sup>195</sup> *Id.*

<sup>196</sup> Eur. Ct. H.R., Koufaki and Adedy v. Greece (2013), para. 37.

<sup>197</sup> See OECD, Fair and Equitable Treatment Standard in International Investment Law (OECD Publishing, Working Paper 2004/03 2004), <http://dx.doi.org/10.1787/675702255435>.

<sup>198</sup> See *Albania Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24.

<sup>199</sup> *Ecuador v. Occidental Exploration & Prod. Co.*, 2005 WL 1104120.

<sup>200</sup> *Id.*

mine how the subjects had been treated comparatively.<sup>201</sup> If there was a divergence in treatment, the tribunal would then decide whether the challenged governmental action could be justified or whether the governmental action had a reasonable connection with its rational policy.<sup>202</sup>

## VII. RIGHT OF EQUALITY - HUMAN RIGHTS LAW

Discrimination between equally ranked creditors can also be highly contentious from a human rights perspective. The applicants in *Mamatras v. Greece* also invoked Article 14 of the ECHR (Article 14).<sup>203</sup> Article 14 imposes a positive duty on the state when it discriminates on grounds set forth by the ECHR or on “other status” unless the discrimination can be justified.<sup>204</sup> Discrimination exists when persons in relatively comparable situations are treated differently, or where individuals in incomparable situations are treated alike.<sup>205</sup> Protection under Article 14 cannot be raised on its own, but only within the ambit of the rights and freedoms protected by the ECHR.<sup>206</sup> That being said, the ECtHR has been willing to extend the reach of Article 14 and has noted that Article 14 is an “autonomous” provision which can be violated even where the substantive article relied upon to invoke Article 14 has not been violated.<sup>207</sup>

Evaluating an Article 14 claim is particularly difficult, as illustrated in *Stübing*,<sup>208</sup> and they are judged on a case-by-case basis. For a violation of Article 14 to exist, the key element is that of a difference in treatment of persons in analogous or relevantly similar situations.<sup>209</sup> It must be shown that the treatment in question was less favorable than that received by other groups in “analogous situations,” the identity of which will usually be determined objectively on the face of the complaint itself.<sup>210</sup> However, not every different treatment will be

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<sup>201</sup> *Id.*

<sup>202</sup> Jacob, *supra* note 29.

<sup>203</sup> Rory O’Connell, *Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR*, 29 LEGAL STUD. 211 (2009).

<sup>204</sup> *Id.*

<sup>205</sup> See *Adami v. Malta*, 44 Eur. Ct. H.R. 3 (2006); *Coster v. United Kingdom*, 33 Eur. Ct. H.R. 20 (2001) (“The right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”). *Id.*

<sup>206</sup> See Janneke Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, 13 HUM. RTS. L. REV. 99 (2013).

<sup>207</sup> See O’Connell, *supra* note 203; see also *Belgian Linguistic Case*, No. 1 (1967), Ser. A, No. 5 (1979–1980), 1 EHRR 241 No. 2 (1968), Ser. A, No. 6 (1979–1980) 1 EHRR 252, Eur. Ct. H.R. [hereinafter *Belgian Linguistic Case*].

<sup>208</sup> See, e.g., *Stübing v. Germany*, App. No. 43547/08, Eur. Ct. H.R. (2012).

<sup>209</sup> See *Gerards*, *supra* note 206.

<sup>210</sup> *Abdulaziz v. the United Kingdom*, 7 Eur. Ct. H.R. 471 (1985).

discriminatory.<sup>211</sup> Indeed, the State bears the burden to demonstrate that its practice was reasonable and rational in light of its policy goals.<sup>212</sup> The state also bears the burden of proving that the treatment was proportionate regarding the pursuit of the policy objective by striking “a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention.”<sup>213</sup>

Accordingly, as private investors were obliged to accept the PSI (as opposed to certain public investors who were excluded from CACs and whose rights remained untouched), Article 14 may be applicable to investors in analogous situations who were treated unequally or to investors in dissimilar situations who were treated alike. The list of grounds for discrimination enumerated in Article 14 is more inclusive than it is exclusive. Article 14 has been successfully invoked in cases based on sexual orientation<sup>214</sup> and wedlock.<sup>215</sup> The ECtHR proclaimed in *Rasmussen v. Denmark*, “[t]here is no call to determine on what ground this difference was based, the list of grounds appearing in Article 14 not being exhaustive,”<sup>216</sup> therefore, any differentiation may fall under Article 14 ECHR, despite not being listed in the Article.<sup>217</sup>

#### *A. The Right of Property in Conjunction with the Right of Equality in the Context of the Greek Haircut*

We now turn to examine the application of the right of equality in the context of the Greek Default. To this end, we shall first examine the ruling of the ECtHR in *Mamatas*.

#### *B. The ECtHR’s Reasoning in Mamatas with Respect to Article 14*

In *Mamatas*, the applicants contended that the same treatment toward individual investors and professional investors breached Article 14 as they were not in analogous circumstances, given individual investors’ lack of detailed professional insights.<sup>218</sup> The ECtHR noted that, in light of the high volatility of the

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<sup>211</sup> See *Belgian Linguistic Case*, *supra* note 207 (stating in the case that the “difference and discrimination are two distinct notions and a difference in treatment is not necessarily discriminatory, provided a reasonable and objective basis can be found.”).

<sup>212</sup> See *Abdulaziz*, 7 Eur. Ct. H.R. 471, at paras 74–83.

<sup>213</sup> *Id.* at paras 83–86.

<sup>214</sup> See, e.g., *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, 1999-IX Eur. Ct. H.R. at § 11, 28.

<sup>215</sup> See, e.g., *Marckx v. Belgium*, (No. 31), Eur. Ct. H.R. (ser. A) (1979); *Inze v. Austria*, (No. 126), Eur. Ct. H.R. (ser. A) at § 41 (1987); Eur. Ct. H.R. (sec. 3).

<sup>216</sup> *Rasmussen v. Denmark*, App. No. 8777/79, 87 Eur. Comm’n H.R. (1984).

<sup>217</sup> *Id.*

<sup>218</sup> *Mamatas*, App. No. 63066/14, Eur. Ct. H.R. at § 124.

bond market, it was very difficult to differentiate between the various investors and to examine each investor separately.<sup>219</sup> This would require significant time, which was not available to Greece at the time, because of the country's urgent financial needs.<sup>220</sup> Secondly, the ECtHR noted that laying down criteria to differentiate between bond holders would be problematic in light of the "pari passu" principle entailed in GGBs and accepted by all investors contractually.<sup>221</sup> This principle requires equal treatment between investors and would, therefore preclude investors from being treated differently.<sup>222</sup> Lastly, the ECtHR noted that distinguishing between investors would have also been practically difficult, given the volatility of investors.<sup>223</sup> The ECtHR also considered that any exemption of specific categories of bond holders from the PSI would have devastating consequences for the Greek economy and the PSI itself, and might have even led to Greece's bankruptcy.<sup>224</sup> Consequently, the ECtHR found that there had been no violation of Article 14 taken in conjunction with Article 1.<sup>225</sup>

The above one-size-fits-all approach adopted by the ECtHR has two main shortcomings. Primarily, the ECtHR did not consider the differences between investors.<sup>226</sup> Indeed, the haircut sustained by investors was largely diversified as the bonds differed greatly in the maturity and yield.<sup>227</sup> According to Jeromin Zettelmeyer,<sup>228</sup> the Greek Haircut contained the greatest variation between investor losses of all haircuts, with some investors holding bonds with extremely long maturity dates (e.g. in 2057) who sustained a haircut close to zero, or even negative.<sup>229</sup> Given the radical difference in the level of interference to their property, investors subject to the Greek Haircut were not in analogous situations.

Additionally, the ECtHR referred to the fact that several investors acted in a reckless, speculative fashion by purchasing their bonds at a significant discount when Greece was already facing financial distress.<sup>230</sup> Nonetheless, it did not take this into account when determining whether to differentiate between investors.<sup>231</sup> Previous case law of the ECtHR took into account investors' speculative

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<sup>219</sup> *Id.* at § 130.

<sup>220</sup> *Id.* at § 137.

<sup>221</sup> *Id.* at § 134.

<sup>222</sup> *Id.* at § 130.

<sup>223</sup> *Id.* at § 137.

<sup>224</sup> *Id.* at § 138.

<sup>225</sup> *Id.* at § 142.

<sup>226</sup> *See id.* at § 137.

<sup>227</sup> Zettelmeyer, *supra* note 78,

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Mamatras*, App. No. 63066/14, Eur. Ct. H.R at § 118.

<sup>231</sup> *Id.* at §§ 130–42

nature of an investment.<sup>232</sup> In *De Dreux-Breze v. France*, for example, the court stated that the investor bought the bonds randomly without considering the profits and risks.<sup>233</sup>

The *Mamatras* court should have taken into account the above elements in determining whether investors with such different backgrounds and losses should be treated alike. It should be noted that *Mamatras* has not been appealed, and therefore the Grand Chamber will not have the opportunity to correct these shortcomings.

### *C. Different Treatment of Private and Institutional Investors*

The context of this discussion spurs an examination of the issue of whether official creditors, such as the European Central Bank (ECB), the largest holder of GGBs, and private investors are in “analogous situations” and should, therefore, have been treated alike under Article 14. For there to be direct discrimination, there must be a “difference in the treatment of persons in analogous, or relevantly similar situations,” which is “based on an identifiable characteristic.”<sup>234</sup>

In the Greek Haircut, only private investors were affected, as opposed to certain public investors holding GGBs who were not included in the PSI.<sup>235</sup> In particular, the ECB announced, on February 17, 2012, a swap of its GGBs for new bonds exempted from the collective action clauses (which essentially meant that ECB was senior to private-sector bondholders).<sup>236</sup> In the context of Article 14, reference to the announcement of the ECB’s Outright Monetary Transactions (OMT) program is illuminating. It expressly stipulates that:

[t]he Eurosystem intends to clarify in the legal act concerning Outright Monetary Transactions that it accepts the same (*pari passu*) treatment as private or other creditors with respect to bonds issued by [E]uro area countries, and purchased by the Eurosystem through Outright Monetary Transactions, in accordance with the terms of such bonds.<sup>237</sup>

Thus, when the ECB obtained GGBs, it perceived itself, and was perceived as, an equal-ranking creditor with other private GGBs holders with the same

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<sup>232</sup> See MAYA SIGRON, *LEGITIMATE EXPECTATIONS UNDER ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2014).

<sup>233</sup> *De Dreux-Breze v. France*, Eur. Ct. H.R. (2011), at 9.

<sup>234</sup> *Carson v. United Kingdom* (2010), Eur. Ct. H.R., ¶ 61. See also *D.H. v. the Czech Republic* (2007), Eur. Ct. H.R., ¶ 175; *Burden v. The United Kingdom* (2008) Eur. Ct. H.R., ¶ 60.

<sup>235</sup> *Asmussen: ECB Not Part Of Greek PSI Debt Deal*, THOMSON REUTERS (Jan. 27 2012), <https://uk.reuters.com/article/eurozone-greece-ecb/asmussen-ecb-not-part-of-greek-psi-debt-deal-id UKB4E7HT01S20120127>.

<sup>236</sup> Patrick R. Wautelet, *The Greek Debt Restructuring And Property Rights. A Greek Tragedy For Investors?*, SSRN ELECTRONIC JOURNAL (2014).

<sup>237</sup> European Central Bank, *Technical Features of Outright Monetary Transactions* (2012) [http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906\\_1.en.html](http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html) (last visited Mar. 19, 2017).



rights and obligations as private investors.<sup>238</sup> One must, therefore, examine if the difference in treatment is discriminatory, i.e. if it “has no objective and reasonable justification” and is without a “reasonable relationship of proportionality between the means employed and the aim sought to be reali[z]ed.”<sup>239</sup> “States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.”<sup>240</sup> The margin varies according to the circumstances, subject matter, and background of each case.<sup>241</sup> However, it is generally acknowledged that, due to the state’s direct knowledge of society and its needs, the state is well positioned to define the exact nature of a legitimate aim in matters of economic or social strategy.<sup>242</sup>

Thus, to comply with Article 14, Greece would have to demonstrate legitimate reasons to treat the ECB differently and that such special treatment was proportionate to the policy goal sought to be realized. It is difficult to foresee what such reasons would be, but one may refer to the statement made by the ECB’s President regarding the participation of the ECB in Greek debt restructuring. He stated that “any voluntary restructuring of our [the ECB’s] holdings would be monetary financing” and would, therefore, interfere with the ECB’s independence and impartiality.<sup>243</sup> Such restructuring would de facto constitute financing of an EU Member State’s government.<sup>244</sup> This argument was tested in *Accorinti v. ECB* by 200 Italian investors who claimed that the ECB received preferential treatment over all GGB holders.<sup>245</sup> The General Court of the EU rejected the general principle of equal treatment that could apply between private investors and the ECB.<sup>246</sup> The court held the two investor groups to be distinguishable because the ECB was working in the public’s interest while private investors were in the pursuit of profit.<sup>247</sup> *Accorinti* was examined by the General Court of the EU based on liability of EU institutions, so the findings of the ECtHR may not match the Greek Haircut.<sup>248</sup> To date, this issue has not been examined by the ECtHR.

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<sup>238</sup> See *id.*

<sup>239</sup> See *Marckx v. Belgium* (1982) Eur. Comm’n. H.R., ¶ 33.

<sup>240</sup> *Van Raalte v. Netherlands*, Eur. Ct. H.R. (1997), para. 39; *Larkos v. Cyprus* (1999) Eur. Ct. H.R.; see also *Stec v. United Kingdom*, Eur. Ct. H.R. (2006).

<sup>241</sup> See *Petrovic v. Austria*, Eur. Ct. H.R. (2001), para. 307.

<sup>242</sup> See *Handyside v. The United Kingdom*, Eur. Ct. H.R. (1976), paras 48–49.

<sup>243</sup> See European Central Bank, *Introductory Statement to the Press Conference (With Q&A)* (2012), <http://www.ecb.europa.eu/press/pressconf/2012/html/is121004.en.html>.

<sup>244</sup> See *id.*

<sup>245</sup> *Accorinti*, Eur. Ct. H.R. (2015).

<sup>246</sup> *European Central Bank*, *supra* note 243

<sup>247</sup> *Id.*

<sup>248</sup> See *id.*

## VIII. THE RIGHT OF DUE PROCESS - ARTICLE 6 AND ARTICLE 13 ECHR

The investors in *Mamatas* could have raised additional arguments, which are addressed herein. In the context of sovereign default and debt restructuring, it is often the case that due process is not followed. In this context, due process relates to the investors' legitimate expectations, which dictate that properly established and sanctioned rules and procedures must be followed prior to interference with investors' rights.<sup>249</sup> Due process includes the right to a fair trial as well as the right to an adequate remedy, as these rights are intimately related.<sup>250</sup> Those rights are discussed here successively.

*A. Fair Trial - Investment Tribunals*

The right to a fair trial under Article 6 of the ECHR is an essential component of investor rights, and has been analyzed by investment tribunals outside the ECHR framework. In *Mondev v. United States*, the tribunal considered the concept of a fair trial without making specific reference as to why the application of Article 6 was necessary.<sup>251</sup> This prompts a discussion of how Article 6 is relevant to investors in cases of sovereign default, and specifically in the case of the Greek Default.<sup>252</sup>

*B. Review of Article 6 of ECHR*

Primarily, it should be noted that Article 6 of the ECHR applies to both physical persons as well as legal entities<sup>253</sup> and establishes a legal framework of procedural safeguards during the judicial process.<sup>254</sup> Article 6 refers only to the judicial process relating to "civil rights and obligations" as well as criminal cases.<sup>255</sup> In relation to what constitutes "civil rights" in the context of this Article, it will suffice to say that according to the ECHR, civil rights are defined as pro-

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<sup>249</sup> See GIACINTO DELLA CANANEA, *DUE PROCESS OF LAW BEYOND THE STATE* (2016).

<sup>250</sup> *The Right to Due Process*, ICELANDIC HUMAN RIGHTS CENTRE, <http://www.humanrights.ie/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-due-process> (last visited July 11, 2017).

<sup>251</sup> *Mondev International Ltd. v. United States* (2002) ICSID Case No. ARB(AF)/99/2.

<sup>252</sup> See *infra* Part VII(A)(2).

<sup>253</sup> Marius Emberland, *The Usefulness of Applying Human Rights Arguments in International Commercial Arbitration – A Comment on Arbitration and Human Rights by Alexander Jakšić*, 20 J. OF INT. ARB. 355, 361 (2003).

<sup>254</sup> Dr hab. Jacek Chlebny, Judge of the Supreme Administrative Court in Poland, Speech entitled *Standards Of The Provisional Protection Against Expulsion* (June 11, 2013), [http://www.echr.coe.int/Documents/Speech\\_20130611\\_Chlebny\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20130611_Chlebny_ENG.pdf).

<sup>255</sup> See *Guide on Article 6 of the European Convention on Human Rights*, ECHR (Apr. 30, 2013), [www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf).

ceedings which, in domestic law, come under “public law,” and whose result is decisive for private rights and obligations.<sup>256</sup> Hence, given the nature of GGBs as loan agreements, the unilateral amendment of the terms of such agreements through the introduction of CACs via Law 4050/2012 would affect investors’ “civil rights” for the purposes of Article 6(1). The European Court of Justice (“CJEU”) in *Stefan Fahrenbrock v. Hellenische Republik* examined a similar question—namely, whether the losses sustained by investors through the introduction of CACs in GGBs fall within the meaning of “civil or commercial matters” in Regulation No 1393/2007.<sup>257</sup> In *Fahrenbrock*, the CJEU noted that the Regulation was applicable because judicial proceedings brought by private persons holding state bonds against the issuing state for compensation for disturbance of ownership and property rights, contractual performance, and damages do not fall within the meaning of “civil or commercial matters” in Regulation No 1393/2007.<sup>258</sup>

One of the most fundamental principles and procedural safeguards contained in Article 6 is one’s right to be heard by an independent and impartial tribunal in public within a reasonable amount of time before a litigant’s rights are jeopardized.<sup>259</sup> This principle has been broadly interpreted by ECtHR caselaw to include all stages of the judicial process from the pre-trial phase through the execution of judgment.<sup>260</sup> Indeed, as it was stated in *Delcourt v. Belgium*:<sup>261</sup> “In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision.”<sup>262</sup>

Thus, the question arises whether the unilateral imposition of CACs just thirteen days before the close of offers for participation in the PSI raises the question if investors had the opportunity to be heard by an independent tribunal before their rights were jeopardized. The ECtHR examined a similar question in *Adorisio v. the Netherlands*.<sup>263</sup> In *Adorisio*, bondholders complained they were denied the right to a fair trial when the Dutch government granted them only ten days to challenge the expropriation of assets investors held in SNS Reaal, a

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<sup>256</sup> *See id.*

<sup>257</sup> *Fahrenbrock v. Hellenische Republik* [2015], 2014 E.C.R. 2424.

<sup>258</sup> *Id.*

<sup>259</sup> *See Article 6: The Right To a Fair Trial - Equality and Human Rights*, EQUALITY AND HUM. RTS. COMMISSION (Aug. 9, 2014) [https://www.equalityhumanrights.com/sites/default/files/strategic\\_plan\\_-\\_web\\_accessible.pdf](https://www.equalityhumanrights.com/sites/default/files/strategic_plan_-_web_accessible.pdf) (last visited Sept. 11, 2017).

<sup>260</sup> F. Kuitenbrouwer, *Eerlijkheid alleen in toga?*, DD 334–36 (1972); E.A. Alkema, *Telt de 'voorfase' mee voor de redelijke termijn?*, NJB, 604 (1994).

<sup>261</sup> *Delcourt v. Belgium*, 1 Eur. H.R. Rep. 355 (1979–1980).

<sup>262</sup> *Id.* at para 25.

<sup>263</sup> *Adorisio v. Netherlands*, App. No. 47315/13, 61 Eur. H.R. Rep. SE1 (2015).

banking and insurance conglomerate.<sup>264</sup> The ECtHR ruled that the investors' case was inadmissible because the short window granted to investors to challenge the government's expropriation measures did not place investors at an unfair disadvantage.<sup>265</sup> The ECtHR noted that investors could still bring an effective appeal within such time window, which was justifiably short in light of the urgent need for the Dutch government to intervene in SNS Reaal to prevent serious harm to the national economy.<sup>266</sup>

In light of the above, judgment investors' claim of an Article 6 breach due to the introduction of CACs is unlikely to succeed given that the introduction of CACs did not change the payment terms of the GGBs and investors had the opportunity both to appeal and to participate voluntarily at the PSI.

### *C. Right of Adequate Remedy - Article 13 of ECHR*

Article 13 of the ECHR reads: "Everyone whose rights and freedoms, as set forth in this Convention, are violated shall have an effective remedy before a national authority, although the violation has been committed by persons acting in an official capacity."<sup>267</sup>

Article 13 embodies the principle of subsidiarity and charges the ECHR with safeguarding those rights.<sup>268</sup> It provides that where an individual has an arguable claim as a victim of a violation of rights set forth in the Convention, he or she should have access to a remedy before a national authority in order to have his or her claim decided and, if appropriate, to obtain redress.<sup>269</sup> The referenced authority need not necessarily be a judicial authority. Should the authority not be judicial in nature, then the powers and guarantees of the authority would be taken into account when determining if the requested remedy before it would be effective.<sup>270</sup>

In the case of Greece, bondholders could argue that there was a lack of adequate remedy based upon two reasons. Prospects for an adequate remedy were in question due to the difficulties of enforcement as mentioned above.<sup>271</sup> Addi-

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *European Convention on Human Rights*, ECHR art. 13 (1950), [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>268</sup> *Id.*

<sup>269</sup> See *Silver v. United Kingdom*, App. Nos. 5947/71, 6205/73, 7072/75, 7061/75, 7107/75, 7113/75, and 7136/75; 13 Eur. H.R. Rep. 582, 582–83 (1991).

<sup>270</sup> Martin Kuijer, Professor of human rights law at the VU University Amsterdam, *Effective Remedies as a Fundamental Right* (2014) at 5.

<sup>271</sup> *The Duty To Provide An Effective Remedy*, ICELANDIC HUMAN RIGHTS CENTRE (Mar. 25, 1996), <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-life/the-duty-to-provide-an-effective-remedy>.

tionally, the Greek government acted unilaterally and did not respect investors' rights to be heard by introducing CACs and the subsequent conversion, thus breaching Article 13 of the ECHR. Notably, this would not be an easy case for the investors, as the right conferred in Article 13 is not absolute.<sup>272</sup> The right can be circumvented in certain cases, provided it is in the public's interest and the circumvention is proportionate to the means utilized. The dire economic situation of Greece coupled with the urgent need to come to an agreement to secure financing could allow for determination in favor of the Greek State.

#### IX. HUMAN RIGHTS ARGUMENTS TO DEFEND INVESTORS' CLAIMS

As discussed above, human rights laws can be used in defense of investors' rights in a case of sovereign default; however, human rights laws also impose obligations on states that may very well require them to take actions which infringe on investors' rights. In such cases, the state maintains conflicting obligations under international law: 1) its human rights obligations on the one hand, whether derived from treaties or customary international law, and 2) its BIT obligations on the other hand.

Indicatively, in *Suez v. Argentina*,<sup>273</sup> Argentina invoked the public's access to water against the investors' wish to modify tariff rates under the economic equilibrium clause in a concession agreement.<sup>274</sup> Argentina argued that imposing a price freeze on the water was legitimate, and in fact necessary, because of the basic human rights obligations imposed on Argentina under the International Covenant on Economic, Social, and Cultural Rights (and General Comment 15 thereto), the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women.<sup>275</sup> Thus, possible breach was justified on the grounds of necessity.<sup>276</sup> The tribunal recognized that the circumstances of the dispute, namely Argentina's default, were likely to "raise a variety of complex public and international law questions, including human rights considerations."<sup>277</sup>

But it also stated that Argentina could use other means to protect the people's right to water without infringing on human rights. Indeed, the tribunal noted:

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<sup>272</sup> CATHERINE BARNARD & OKEOGHENE ODUDU, *THE OUTER LIMITS OF EUROPEAN UNION LAW* (2009).

<sup>273</sup> *Suez v. Argentine Republic*, ICSID Case No. ARB/03/19 (2005), [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C19/DC516\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C19/DC516_En.pdf).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Suez v. Argentine Republic*, Order in Response to a Petition for Transparency and Participation as amicus curiae, ¶ 19 (May 19, 2005), 21 ICSID Rev. – FILJ 351 (2006).

Argentina is subject to both international obligations *i.e.* human rights *and* treaty obligations [sic], and must equally respect both of them. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations.<sup>278</sup>

The same result was also reached by the tribunal in *Impreglio v. Argentina*,<sup>279</sup> where, although the tribunal acknowledged the people's right to water and the imminent peril posed to that right by the financial crisis, it noted that because Argentina had contributed to the financial crisis, it could not invoke the necessity defense.<sup>280</sup>

Notably, the *Suez* and *Impreglio* have been criticized as falling short of addressing human rights considerations and protecting human rights.<sup>281</sup> However, they are nonetheless indicators of how investment tribunals address human rights issues.<sup>282</sup> The cases are important in the sense that they indirectly introduce a method of addressing human rights when they appear to conflict with investors' rights, the proportionality analysis,<sup>283</sup> a concept "borrowed" from human rights law. The analysis in question, although sometimes problematic because of the somewhat incomparable nature of conflicting rights, can be used to resolve conflicts between BIT standards and human rights obligations.<sup>284</sup>

<sup>278</sup> *Suez v. Argentine Republic*, Decision on Liability, para. 262 (July 30, 2010), <https://www.itlaw.com/sites/default/files/case-documents/ita0826.pdf>.

<sup>279</sup> *Impreglio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17 (2011), [http://icsidfile.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C109/DC2171\\_En.pdf](http://icsidfile.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C109/DC2171_En.pdf).

<sup>280</sup> *Id.*

<sup>281</sup> See Edward Guntrip, *International Human Rights Law, Investment Arbitration And Proportionality Analysis: Panacea Or Pandora's Box?* EJIL: Talk! (Jan. 7, 2014), <http://www.ejiltalk.org/international-human-rights-law-investment-arbitration-and-proportionality-analysis-panacea-or-pandoras-box/>.

<sup>282</sup> See, e.g., *Biloune v. Ghana*, 95 I.L.R. 183, UNCITRAL (1989) (one of the few cases where the tribunal explicitly declined to deal with human rights issues); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (2008) (Where although the tribunal did not award any compensation to the consortium on account of causation issues, it did rule that Tanzania was liable for breach of BIT). The conjoined cases, *Border Timbers Ltd. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award (2012), and *Bernhard von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (2012) (Where the tribunal noted that the proceedings may have a bearing upon the rights of the affected indigenous communities, but concluded that international human rights have no relevance to the dispute) (ECCHR 2012).

<sup>283</sup> See Stephen W. Schill, *Cross-Regime Harmonization Through Proportionality Analysis: The Case Of International Investment Law, The Law Of State Immunity And Human Rights*, 27 ICSID REV. 1, 87 (2012).

<sup>284</sup> Benedict Kingsbury & Stephen W. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality*, INT'L. INV. L. AND COMP. PUB. L. (2010).

This proportionality analysis comprises three elements: first, the measure taken must have been suitable for the goals sought; second, the measure must have been necessary, in the sense that it was the least restrictive and burdensome to achieve the targeted goals; third, the measure must have been *stricto sensu* proportional.<sup>285</sup> This structured approach allows tribunals to assess public and private interests, which may be simultaneously at issue. For investors, it may involve protecting themselves by constraining the state's police powers as a justification for measures taken. For the state, it provides room to take measures in good faith with genuine and legitimate objectives.<sup>286</sup>

For instance, in *SD Myers, Inc. v. The Government of Canada*,<sup>287</sup> the tribunal was of the view that the concept of expropriation takes into account, among other factors, the impact of a regulation, its purpose, the legitimate investor expectations, the degree and intensity of interference, the importance of the interests at stake, and the even-handedness exhibited in the application of state measures.<sup>288</sup> It recognized that these elements need to be balanced and thus it implicitly assessed within the notion of proportionality.<sup>289</sup> The first case where the structured proportionality analysis was used was *Tecnicas Medioambientales Tecmed SA v. Mexico*,<sup>290</sup> where the tribunal noted that to establish whether the measure in question constituted an expropriation, the proportionality of the measure vis a vis public interest should be taken into account.<sup>291</sup>

Although *Tecnicas* was the only case where the proportionality test was directly invoked, other tribunals have decided investor disputes mainly based on the above principle, thus allowing states to invoke human rights considerations to demonstrate that a state act was legitimate and fair. *Continental Casualty v. Argentina*<sup>292</sup> was such a case. *Continental Casualty* involved a claim for expropriation due to emergency measures taken by the Argentinean government during the 2001 financial crisis.<sup>293</sup> The *Continental Casualty* tribunal did not explicitly refer to the concept of proportionality.<sup>294</sup> Instead, it followed a similarly

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<sup>285</sup> For further analysis, see ROBERT ALEXY, *THEORIE DER GRUNDRECHTE* (Suhrkamp, 5.A. ed. 1995).

<sup>286</sup> Jasper Krommendijk & John Morijn, 'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration (Sept. 30, 2009). HUM. RTS. IN INT'L INV. L. AND ARB. 421–55 (Pierre-Marie Dupuy et al. eds., Oxford University Press 2009), <http://ssrn.com/abstract=2333550>.

<sup>287</sup> *SD Myers, Inc. v. Government of Canada* (Myers), Partial Award, 13 November 2000, 40 ILM 1408, ¶¶ 282–83, (2001).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Tecnicas Medioambientales Tecmed SA v. Mexico*, 290, ICSID Case No. ARB (AF)/00/2 (2004), Award, ¶ 122 (2003).

<sup>291</sup> *Id.*

<sup>292</sup> *Cont'l Cas. Co. v. Argentina*, ICSID Case No. ARB/03/9, Award, (2008).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

structured balancing approach and concluded that the measures in question were proportionate as they “were in part inevitable, or unavoidable, in part indispensable and in any case material or decisive in order to react positively to the crisis’ and hence there undoubtedly existed ‘a genuine relationship of end and means in this regard.’”<sup>295</sup>

As such, in the case of Greece, the government could invoke human rights as a defense to the possible breach of BITs. However, it is difficult to predict the result, as the majority of tribunals have not favored the use of human rights to escape liability for breach of the BIT.<sup>296</sup> Nonetheless, *Continental Casualty* is an example of how measures to protect human rights can be successfully used as a defense for possible BIT breaches when such actions meet the proportionality test.<sup>297</sup>

In the absence of explicit human rights provisions in a BIT, a direct invocation of international human rights appears problematic. However, such invocation has been made through choice of law provisions. For instance, Article 40 of the Canadian Model BIT provides that tribunals shall decide matters “in accordance with this agreement and the applicable rules of international law.”<sup>298</sup> It bears noting that most BITs concluded by Greece refer disputes with investors to the International Centre for Settlement of Investment Disputes (ICSID),<sup>299</sup> whose rules, Article 42(1) in particular, proclaim that, besides the law of the contracting state party to the dispute, “such rules of international law as may be applicable” shall govern the dispute.<sup>300</sup>

With the exception of only three Greek BITs (with Germany, Zaire, and Morocco), all BITs concluded by Greece provide for the application of obligations under international law existing at present or established between the contracting parties.<sup>301</sup> This is not the only available mechanism by which human rights can be invoked in an investor-state dispute. Provided the above procedural requirement is met, tribunals have, on their own initiative, referred to case law

<sup>295</sup> *Id.* at ¶¶ 197, 232.

<sup>296</sup> See MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 90 (Juan Pablo Bohoslavsky & Jernej Letnar Cernic eds., 2014).

<sup>297</sup> *Cont’l Cas. Co.*, *supra* note 292.

<sup>298</sup> Canadian 2004 Model BIT art. 40 (2004).

<sup>299</sup> See Nicholas Moussas & Stratos Voulgaridis, *Greece Investment Treaty Report*, (2013), <http://globalarbitrationreview.com/jurisdiction/1004661/greece>. However, there are certain BITs concluded by Greece that provide for: a) an ad hoc tribunal constituted in accordance with the arbitration rules of UNCITRAL, (e.g., BITs with Argentina, Croatia, Russia, Latvia, Serbia, etc., where international law is taken into account), b) the Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm (Hungary, where international law is taken into account on account of the BIT), c) the Arbitral Tribunal of the ICC in Paris (Hungary and Turkey where again international law is only taken into account if agreed by the contracting States) or d) the ICSID Additional Facility.

<sup>300</sup> *Jacob*, *supra* note 30, at 27.

<sup>301</sup> *Moussas*, *supra* note 299.



relied upon within the jurisprudence of human rights courts, such as the ECtHR in determining whether the rights of an investor have been breached.<sup>302</sup> For instance, in *Tecnicas*, the tribunal referred to ECtHR case law in assessing whether an expropriation took place.<sup>303</sup> Similarly, the UNCITRAL tribunal in *Lauder v. Czech Republic* noted that “[BITs] generally do not define the term of expropriation and nationalization, or any of the other terms denoting similar measures of forced dispossession (‘dispossession’, ‘taking’, ‘deprivation’, or ‘privation’).”<sup>304</sup> On the other hand, in his separate opinion in *Int’l Thunderbird Gaming Corp. v. United Mexican States*, Thomas Wälde noted that the ECtHR creates “the judicial practice, most comparable to treaty-based investor-state arbitration.”<sup>305</sup>

As such, the human rights of a larger population can be used as a defense against individual human rights cases brought by investors against the state within the context of public interests.<sup>306</sup> In *De Dreux-Brézé v. France*, a case involving debt restructuring between France and Russia for a debt incurred by the Tsarist regime, the ECtHR emphasized that Article 1 of the First Additional Protocol did not give a right to full repayment.<sup>307</sup> It further stated that the public interest might require a reduction of the repayments or even their complete suspension, noting that Russia was under an obligation to fulfil its citizens’ economic and social rights.<sup>308</sup> What is more, in the case of *Malysh v. Russia*, the ECtHR for the first time moved ahead to recognize “people’s rights” as a legitimate defense for a potential breach of investors rights, ruling that it was legitimate to temporarily put off debt repayment for the purpose of paying urgent expenditures to address social issues.<sup>309</sup>

These cases are of particular importance to the case of Greece, as the alternative to the Haircut was the disorderly default of Greece, which could severely threaten several economic and social rights of the public.

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<sup>302</sup> ERIC DE BRABANDERE, HUMAN RIGHTS CONSIDERATIONS IN INTERNATIONAL INVESTMENT ARBITRATION IN M. FITZMAURICE AND PANOS MERKOURIS, THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 7–8 (2013).

<sup>303</sup> *Tecnicas*, *supra* note 290.

<sup>304</sup> Ronald S. Lauder v. Czech Republic, 2001 WL 34786000, ¶ 200 (UNCITRAL Final Award Sept. 3, 2001).

<sup>305</sup> Int’l Thunderbird Gaming Corp. v. United Mexican States (U.S. v. Mex.), 2006 WL 247692, para. 141 (NAFTA Ch. 11 Arb. Trib. 2006) (separate opinion by Wälde, J.).

<sup>306</sup> See Tamar Meshel, *Human Rights In Investor-State Arbitration: The Human Right To Water And Beyond*, 6 J. INT’L DISP. SETTLEMENT (2015).

<sup>307</sup> *De Dreux-Brézé v. France* (Dec.), No. 57969/00 Eur. Ct. H.R. (2000).

<sup>308</sup> *Goldmann*, *supra* note 138.

<sup>309</sup> See *Malysh v. Russia*, App. No. 30280/03 Eur. Ct. H.R. (2010).

## X. CONCLUSION

Sovereign defaults can have significant implications on investors' rights. The lack of an international mandatory legal framework for sovereign debt restructuring has demonstrated that investors are often left without effective remedy when their rights are prejudiced. To this end, human rights law can provide additional tools for the protection of investors, to the extent that human rights norms are uniformly applied.

The ECtHR recently dealt with investors' rights in the case of a sovereign default in *Mamatas* which revolved around the Greek Haircut. Although the ECtHR's judgment in *Mamatas* has several deficiencies, it nonetheless demonstrated the applicability of human rights norms in investors disputes. This article reviewed the arguments made by the *Mamatas* investors and explored additional human rights considerations that may be invoked by investors in similar occasions. Such notions are also taken into account by investment tribunals, and to this end, the study of human rights implications in cases of sovereign defaults is important for investors, not only in the context of cases before human rights courts, but also to support cases before investment tribunals.

In this context, human rights law can be invoked both to support the claim of an investor asserting that the restructuring violated his human rights, or to bolster the state's position as a defense to any possible breach of protection owed to the investors that could have an adverse effect upon human rights in that country. In this context, it is evident that human rights and investment law are not mutually exclusive, but instead they can be viewed and addressed concurrently to establish a more secure and balanced environment for investments and to provide guidelines for the fair treatment of investors in cases of sovereign default.

